

2019 PRODUCT SUPPORT MANAGER (PSM) WORKSHOP
WARFIGHTER READINESS – PSMs MAKING A DIFFERENCE

THE ROLE OF INTELLECTUAL PROPERTY (IP) & DATA RIGHTS: IP STRATEGIES, SEGREGATION, & MODULATION*

[OK, "MODULARITY" IS PROBABLY MORE ACCURATE]*

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OVERVIEW

- **BLUF: DEVELOPING AN IP STRATEGY**
 - Just do it.
- **THE “DOCTRINE OF SEGREGABILITY”**
 - Foundation of DoD’s modular licensing scheme
- **“SEGREGATION AND REINTEGRATION”**
 - “Black boxes” and “plug and play” strategies
- **MOSA -- MODULAR OPEN SYSTEMS APPROACHES**
 - Institutionalizing modularity & data rights
- **BACKUP BONUS! VALIDATION OF ASSERTED RESTRICTIONS**
 - Does modularity/segregability matter?

A FEW HOT TOPICS IN IP ACQUISITION

■ **The Section 813 Government-Industry Advisory Panel**

- <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzjuAAA> ([Click Here](#))

■ **The Section 875 Independent Review**

- https://www.ida.org/idamedia/Corporate/Files/Publications/IDA_Documents/SFRD/2017/P-8266.pdf ([HERE](#))

■ **New 10 U.S.C. § 2322 – and the “IP Cadre”**

- Requires DoD to have an IP policy, do IP strategies, maintain sample specially negotiated licenses, “cadre” of experts, IP “career path,” etc.

■ **Dept of the Army IP Policy & Implementing Guidance**

- **Army Directive 2018-26 "Enabling Modernization Through the Management of Intellectual Property" (07 Dec 18)**
(https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14261_AD2018_26_Final.pdf ([Here](#)))
- **Implementing Guidance (05 Feb 19)** (<https://www.us.army.mil/suite/doc/51545630> - CAVEAT!!!)

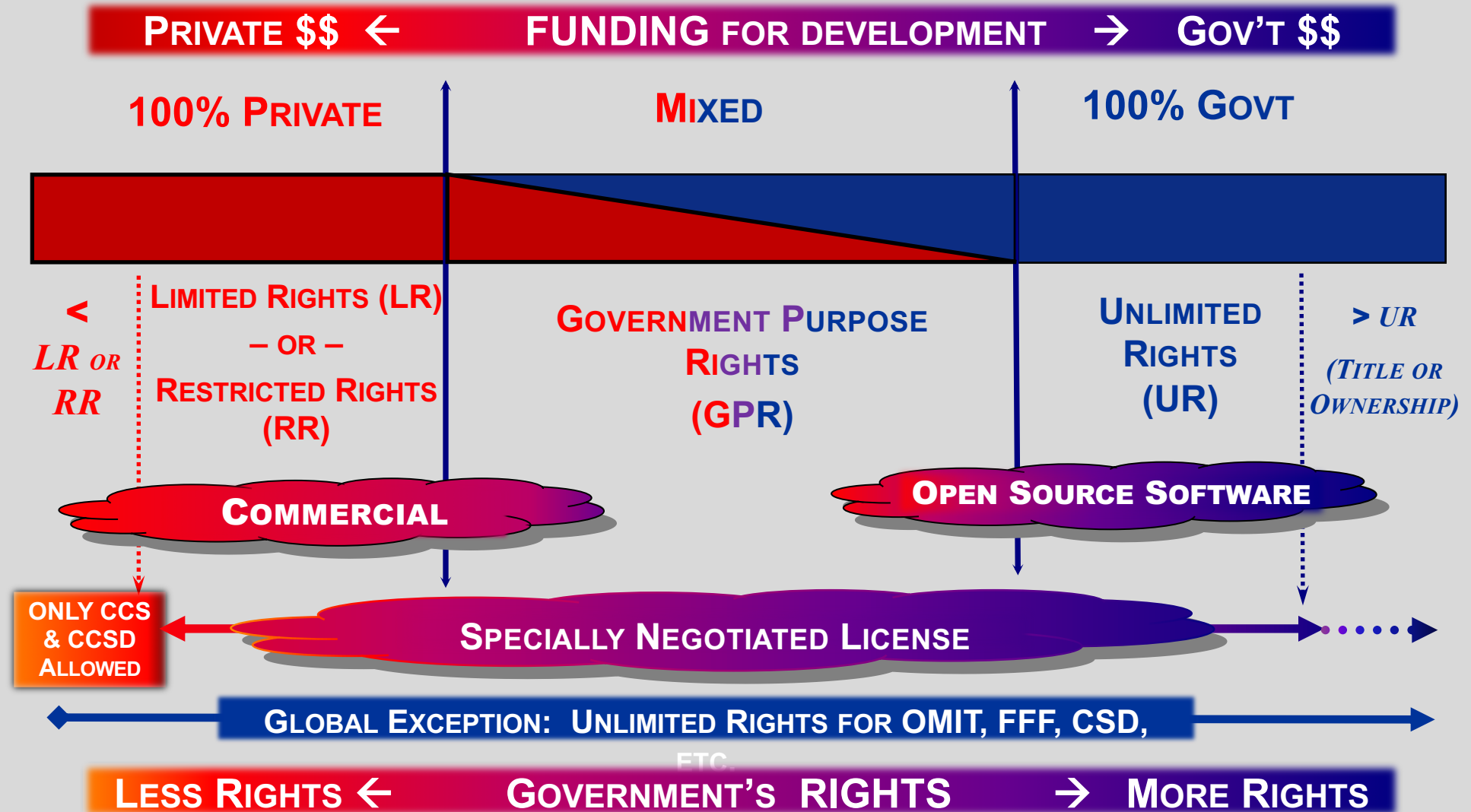
■ **Air Force IP Guidance ... coming soon!**

THE DFARS DATA RIGHTS “QUAD-CHART”

<p>THIS ↓ RELATED TO THIS</p> <p>TYPE OF DATA ↓ TYPE OF ITEM</p>	<p>TECHNICAL DATA (TD) DFARS SUBPART 227.71 (10 USC §§ 2320 & 2321)</p>	<p>COMPUTER SOFTWARE (CS) DFARS SUBPART 227.72 (No specific statutes)</p>
<p>COMMERCIAL ITEMS (CI)</p>	<p><u>CTD:</u> 227.7102 & 252.227-7015 (But use -7013 for USG-funded parts) 252.227-7037</p>	<p><u>CCS & CCSD^{1:}</u> 227.7202 & No clause! (Use the Commercial License (CL)) No Clause or Validation Procedure!</p>
<p>Non- COMMERCIAL ITEMS (NI)</p>	<p><u>NTD:</u> 227.7103 & 252.227-7013 252.227-7037</p>	<p><u>NCS & NCSD^{2:}</u> 227.7203 & 252.227-7014 252.227-7019</p>

1. CCSD is NOT treated like (any/every) other type of CTD; CCSD is treated the same as the CCS it relates to
2. NCSD is NTD, but it is covered by the clauses & subsection that covers the NCS (that the NCSD relates to)
3. All TD or CS must “fit” into one of these four blocks – and the blocks are mutually exclusive
4. Within each block – The governing DFARS Section is listed on top, in black; The “primary rights allocation clause” is below, in **bold-purple text**; and the validation of asserted restrictions clause is in **bold-green text**

DFARS LICENSE RIGHTS IN TD & CS



Bottom Line Up Front (BLUF): Developing an IP Strategy

- **IP Strategies → focus on the investments!**
- **DoD-Funded Development → Require Delivery Now!**
... up-front in the development K
- **Privately-Funded Development → Use Priced Contract Options →** *for delivery of only what makes sense*
- **Evaluate IP Deliverables and Rights during Source Selection –** *and be strong during sole source negotiations!*
- ***Time is of the Essence!*** *You snooze, you lose. True story.*

BLUF: IP STRATEGIES → FOCUS ON THE INVESTMENTS!

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- **IP 101: “IP” = legal scheme to guarantee ROI** *(Return on Investment)*
 - [Investment + sharing with others] → Legal Exclusivity → ROI \$\$
 - This is the foundation of the business model for private hi-tech
 - USG must embrace this model – both for itself, and vendors

 - **The IP Rights “follow the money”** *(Industry: unless that gives it to the other guy)*
 - Kor retains ownership → USG gets “only” a license
 - DFARS:
 - NON-commercial: USG license depends on development \$\$
 - Commercial: Not for software! Maybe for tech data ... if you're sharp.
 - Caveats: Eng'g ≠ Dev't; Commercial ≠ depend on funding or USG-source; commercial status may obscure USG funding

 - **IP Deliverables: You are on your own!** *(Critical mistake #1)*

 - **Wait-and-See Approach: You just lost.** *(Critical mistake #2)*
-

BLUF: DoD-FUNDED DEVELOPMENT → DELIVERY NOW!

■ Now = up-front in the development* contract

- CLIN 001: (includes development of items, processes, software)
- CLIN 002 (cost type): Deliver all TD & CS developed in whole or in part at USG expense under this K
- CLIN 003 (FFP): license rights for CLIN 002 deliverables

■ “Development” – is a higher bar than creation/generation, and some engineering/adaptation

- Only “development” affects the USG license rights
- DFARS – 4 different definitions (≈ exist + workable)

■ You Have Already Paid for It!!!

■ *Bonus: maybe also the K under which created/generated!

- USG likely paid Kor to create/generate
- “Generated under the K” → deferred ordering!

BLUF: DoD-FUNDED DEVELOPMENT → DELIVERY NOW!

■ Don't Know Whether You "Need" it?

- Then why did you just pay for it!

■ Don't Think You Need it Now/Soon?

- Then why did you just pay for it?

■ Think It Will Cost Too Much?

- Development = already paid (CLIN 001).
- Delivery = de minimus in today's digital world (CLIN 002).
- Rights = NSP for 100% USG \$\$... NSP/Fire-sale for mixed \$\$ (CLIN 003)
- Have it delivered in its "native" format (no \$\$ to reformat/alter)
- Admin/Marking? Costs/Prices are included in the Evaluation → guaranteed competitive if not approaching NSP (Kor is already managing this data anyway!)

■ Don't want to have to manage all that data/software?

- This is NOT a real problem ... digital storage & file mgmt for your program.
- So don't – have the Contractor manage the data for you DURING the K, and deliver the collection of data to you at the end (or have a requirement to maintain otherwise) –
- Cost included in evaluation → guaranteed competitive (they are already doing it anyway)

■ Delivery is a "Prerequisite" to Protecting the Government's Rights

**You Have
Already Paid
for It!!!**

BLUF: *PRIVATELY-FUNDED DEVELOPMENT* → PRICED CONTRACT OPTIONS

- When you're not sure whether you will need it later
 - Priced now – in competitive environment
 - Paid later – and ONLY if you actually need it
 - Worst case scenario: you now have “competitive baseline pricing” for the data/rights
- Focus on delivery of only what makes sense – both deliverables and license rights
 - “You ...” “... get* what you pay for” and “... pay for what you get!”
- Deliverables -- more detail → more expensive
 - Source code or DMPD (“detailed manufacturing or process data”)
 - Alternative: “Form, fit, and function” (FFF) data → take advantage of inherent/organic competition without requiring any genuine proprietary data
 - Soon: “interface” data necessary for “segregation or reintegration”
 - Do NOT require reformatting from “native” format (unless you need it)
- Rights – why buy any more than you plan to use?
 - Do NOT default to “I want GPR” (Govt Purpose Rights) ... unless you are supporting ALL USG agencies & contractors
 - Need only “in house” use? Limited Rights & Restricted Rights (and likely commercial licenses) are enough!
 - Need “in house” access for evaluating progress/performance? Consider REMOTE ON-Demand Access to the data (via Kor service)
 - FFF or OMIT data enough? Already comes with Unlimited Rights (and you can “step back” from that if it will save you \$\$)

BLUF: EVALUATE IP DELIVERABLES AND RIGHTS DURING SOURCE SELECTION

- ... And be strong during sole source negotiations!
- The only way (legally) for IP considerations to affect your source selection
 - If not evaluated → eliminates key element of the up-front data rights listing/assertions (post-award changes “would not have materially affected source selection)
- 100% Guaranteed that IP is a core/foundational element of every offer
 - Primary mechanism to guarantee ROI via exclusive, non-competitive “vendor lock-in”
- Do NOT just “ask for GPR in everything”

BLUF: *TIME IS OF THE ESSENCE!*

YOU SNOOZE, YOU LOSE. TRUE STORY.

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- **As time “moves to the right” → less competition & less USG leverage**
 - **Both** for the program life cycle overall and for EACH K
 - **Rights are allocated upon FIRST –**
 - Development
 - Delivery (if not developed under the K)
 - Incorporation into the design
 - **Everything you do not capture → Retained by the contractor**
 - **You may “lose everything” → to require delivery, and exercise your license rights ... even 100% USG funded**
 - Deferred ordering: Currently: 3yrs (FY12 NDAA = ∞ ; FY17 NDAA = 6yrs?)
 - If No Delivery: Kor may assert that USG has “waived those rights” this is not legally accurate, but what is your remedy?
 - **WHEN do you [want to] ask the seller “How much”?**
 - Before you buy the item ... or after?

4-STEP APPROACH TO EACH “THREAD” OF YOUR IP STRATEGY

1. **Identify a “Thread” -- a “target” or “objective” life cycle support activity, for a particular system/subsystem**
 - i. Be Ready for Modularity: Be prepared to “segregate” further into subsystems/components to be able to accommodate differences based on DoD-funded vs. privately-funded, commercial vs. noncommercial, etc.
2. **What TYPE of TD or CS do you “need” to enable that support activity?**
 - i. Identify minimum necessary level of detail – nature of the activity, and the anticipate technical expertise of those performing same
 - ii. If DoD-funded development – plan to leverage your built-in ability to require a more-detailed set of TD/CS than if privately developed/commercial – which may be more than you need for the activity
 - iii. If Privately-funded development (aka “proprietary”): can you utilize “Form, Fit, and Function (FFF) data” & “[major systems] interface” data that is necessary for segregation/reintegration?
3. **What LICENSE RIGHTS do you “need” to enable that activity?**
 - i. In-house (DoD personnel only), or *competitively* out-sourced?
 - ii. Identify the minimum license rights – don’t be restricted by the “default” rights categories (e.g., license to do the target-activity, either in-house/out-house, for only the items being procured here?)
 - iii. If DoD-funded development – leverage “default” license as competitive pressure (your default license is MORE than you need)
4. **Engage with the vendors as EARLY AS POSSIBLE – in a competitive environment**
 - i. During the *development* activities – and continuously as systems are integrated together
 - ii. Be prepared to share a “basic” summary of your IP Strategy with the vendors
 - iii. Ask the vendors to help you answer questions 1, 2, 3, above if you are unsure
 - iv. Don’t underestimate the power of competitive pressure – let it do the heavy lifting

**The “Doctrine of
Segregability” ...**

**... or if you prefer:
“Modular Licensing”**

MODULAR LICENSING (DATA RIGHTS): THE “DOCTRINE OF SEGREGABILITY” (DoS)

- **Noncommercial (N) technical data (TD) or computer software (CS)**
 - **“Source of funds determinations”**: for NTD at DFARS 227.7103-4(b); for NCS: 227.7203-4(b)
 - **“Developed exclusively at private expense” definition**: for NTD at DFARS 252.227-7013(a)(8)(i); and for NCS at 252.227-7013(a)(8)(i)
- **Rights determined at the “lowest practical segregable level”**
 - **Hardware**: Subsystem, component, or sub-component
 - **Software**: module or even subroutine!
 - **Real-life example**: Individual LINES of code! (an industry assertion)
- **Modularity/Segregation “At the Clause Level” → DoD-funded modifications to commercial technology** (or DoD-funded technology “becoming,” or used in, commercial ...)
 - **CTD**: see DFARS 227.7102(a)(1) & (b), referencing 227.7103-6(a)
 - **CCS**: not expressly covered in DFARS, must be addressed during source selections and negotiations – UP-FRONT!

SEGREGABILITY ...

“AT THE CLAUSE LEVEL”

■ Selected Excerpt: DFARS 227.7102-4 Contract clauses.

“(a)(1) Except as provided in paragraph (b) of this subsection, use the clause at [252.227-7015, Technical Data–Commercial Items](#), in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items, components, or processes. (2) * * * * *

“(b) In accordance with the clause prescription at [227.7103-6\(a\)](#), use the clause at [252.227-7013, Rights in Technical Data–Noncommercial Items](#), *in addition to* the clause at [252.227-7015](#), if the Government will have paid for any portion of the development costs of a commercial item. The clause at [252.227-7013](#) will govern the technical data *pertaining to any portion* of a commercial item that was developed in any part at Government expense, and the clause at [252.227-7015](#) will govern the technical data *pertaining to any portion* of a commercial item that was developed exclusively at private expense.”

■ Selected Excerpt: DFARS 227.7103-6(a) Contract clauses.

Use ...[252.227-7013](#) ... when the successful offeror(s) will be required to deliver ... [TD] pertaining to noncommercial items, or pertaining to commercial items for which the Government will have paid for any portion of the development costs (in which case ...[252.227-7013](#) will govern the [TD] *pertaining to any portion* of a commercial item that was developed in any part at Government expense, and ...[252.227-7015](#) will govern the [TD] *pertaining to any portion* of a commercial item that was developed exclusively at private expense).

■ Question 1: Does this affect the commercial status of the item?

■ Question 2: Does this apply to commercial SOFTWARE too?

MODULAR LICENSING / SEGREGABILITY ...

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■ Question 1: Does this affect the commercial status of the item?

■ **NO!** This affects only the license rights granted to DoD

■ Question 2: Does this apply to commercial SOFTWARE too?

■ **Not expressly** ... although available by analogy, negotiation, etc.

NOTE: RIGHTS IN USG-FUNDED CS (NCS?) THAT LATER BECOMES COMMERCIAL CS (CCS)

- EXCERPT FROM 1995 DFARS REWRITE FINAL RULE (60 FR 33464, 28 JUN 1995) , RE DEFINITION OF CCS AND USG RETENTION OF RIGHTS FROM DEVELOPMENT K IF CS SUBSEQUENTLY BECOMES COMMERCIAL CS:
- “8. Computer Software: Thirteen comments addressed computer software. Three commentors suggest the definition of "commercial computer software" is too broad. One also suggests that the definition's broad scope will make it difficult to understand and interpret and contractors will be able to restrict the [*33467] Government's rights in software developed exclusively at Government expense by satisfying one of the criteria that define commercial computer software. Those suggestions are not adopted. The definition of commercial computer software has been modified to reflect requirements in the Federal Acquisition Streamlining Act of 1994. **The Government will not lose rights obtained in software developed at government expense if that software subsequently qualifies as commercial computer software. That situation is covered by 252.227-7014(b)(5) and (c).**
- “ Two commentors suggest GSA should amend its rules to permit these regulations to apply to DoD procurements under GSA schedule contracts. That suggestion cannot be accommodated in these DoD specific regulations.
- “ Two commentors suggest the criterion for determining whether software is commercial should be the source of development funds rather than the market for which the software was developed. That suggestion is not consistent with the thrust of the Federal Acquisition Streamlining Act of 1994.
- “ A commentor suggests there may be a conflict between the definition of commercial computer software, which might include software developed with Government funds, and the policy in 227.7202-1(a) to acquire commercial computer software and documentation under the licenses customarily provided to the public. **If Government funds are used to develop software or documentation, the development contract will determine the Government's rights in that software or documentation. Those rights are protected if the software subsequently qualifies as commercial software.** The commentor expresses concern that when both commercial and noncommercial software are deliverable under a contract, the requirements in 252.227-7014 will be applied to the commercial software. That result is not intended. The clause title, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", clearly indicates that the clause is not applicable to commercial software or documentation . The commentor's suggestion to define commercial computer software documentation in terms of development at private expense is unnecessary and not adopted.”

MODULAR LICENSING (DoS) → LEAVING ONE OR MORE PROPRIETARY MODULE(S)*

- **Option 1: Negotiate for “competitive use” –**
 - Data **deliverables** (technical enabler); and
 - License **rights** (business/legal enabler)
 - Notice I did not say “GPR” ... although GPR will work
 - DoDPR? NavyPR? ProgramPR? SystemSustainmentPR?

- **Option 2: Seek “alternatives” to Option 1 *deliverables* (and the rights will come...)**
 - “Form, fit, and function” (F3 or FFF) data
 - Coming Soon: Segregation & Reintegration Data

***Note:** “Proprietary” used here to denote technology developed exclusively at private expense and/or commercial

SEGREGATION AND REINTEGRATION

SEGREGATION / REINTEGRATION (S/R)

- 1) **New exception to the prohibition against disclosure outside USG of proprietary data** (*i.e.*, data related to technology developed 100% at private expense)
 - Along with “**emergency repair & overhaul**” . . .
 - **Purpose of Release**: only for segregation/reintegration
 - **Implied Data Type??**: only the TD necessary for S/R
 - **Procedural**: notice to data owner & NDA for recipient

- 2) **Included in the expanded Deferred Ordering scheme**
 - ONLY **data type** for which development funding is irrelevant
 - No change to applicable license rights (e.g., Limited Rights)
 - Compensation only for converting & delivering in required form

**OVERVIEW – (2) LONG-AWAITED DFARS CASE 2012-D022:
“RIGHTS IN TECHNICAL DATA (TD) & VALIDATION OF
PROPRIETARY DATA RESTRICTIONS”**

- **Proposed Rule – 81 FR 39481 (6/16/16)**
 - About a dozen public comments received
 - **Current Status: “On hold”** pending results of Sec. 813 Panel, and anticipated changes to the statute via NDAA for FY17

- **Implements Sec. 815 of FY12 NDAA**
 - Enhanced Deferred Ordering → slides to follow
 - “Segregation & Reintegration Data” → slides to follow
 - Validation period now 6 years; no time limit for fraud
 - Gov’t Purpose Rights is the standard/default license for mixed funding (i.e., no change – statute was harmonized with the DFARS!)

- **Most Changes extended to software by policy** (as usual)

- **Numerous “clean-up” revisions & streamlining** -- not expressly required by the new Sec. 815 elements

NDA FOR FY17 – SEC. 809

■ Two (of the four) revisions to 2320 to support MOSA relate to “segregation and reintegration” *(amending S/R language added by Sec. 815 of FY12 NDAA)*

1) Authorized release & use of Limited Rights TD Related to Interfaces necessary for segregation & reintegration – at 2320(a)(2)(D)(i)(II):

“(D) Exception to subparagraph (B). Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if--

“(i) such release, disclosure, or use-- * * *

“(II) is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes;”

2) **Deferred Ordering Data:** amended the existing S/R data-type element to include additional MOSA-related data types – including the one described above:

- 2320(b)(9)(B)(ii): “(ii) ~~is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and~~ is described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2); and”

(*NOTE: Re-Integrated ☺ or added by Sec. 809(f) of the NDAA for FY17 (Conf. Rpt. for S.2943))

Modular Open Systems Approaches (MOSA)

OVERVIEW: FY 16-17-18 – IP/DATA RIGHTS EMERGING ISSUES

- 1) NDAA for FY 2016
- 2) Long-Awaited Proposed Rule for DFARS Case 2012-D022
- 3) **The NDAA for FY 2017 – Public Law 114-328**
 - Modular Open Systems Approaches (MOSA) (Sec. 805(a))
 - Rights in Technical Data. (Sec. 809)
- 4) On the Horizon -- NDAA for FY 2018 – (H.R. 2810; S. 1519)
- 5) Sec. 813[(b)] Government-Industry Advisory Panel

NDAA FOR FY17 – SEC. 805

(SEE ALSO: CONF. REPORT FOR S. 2943)

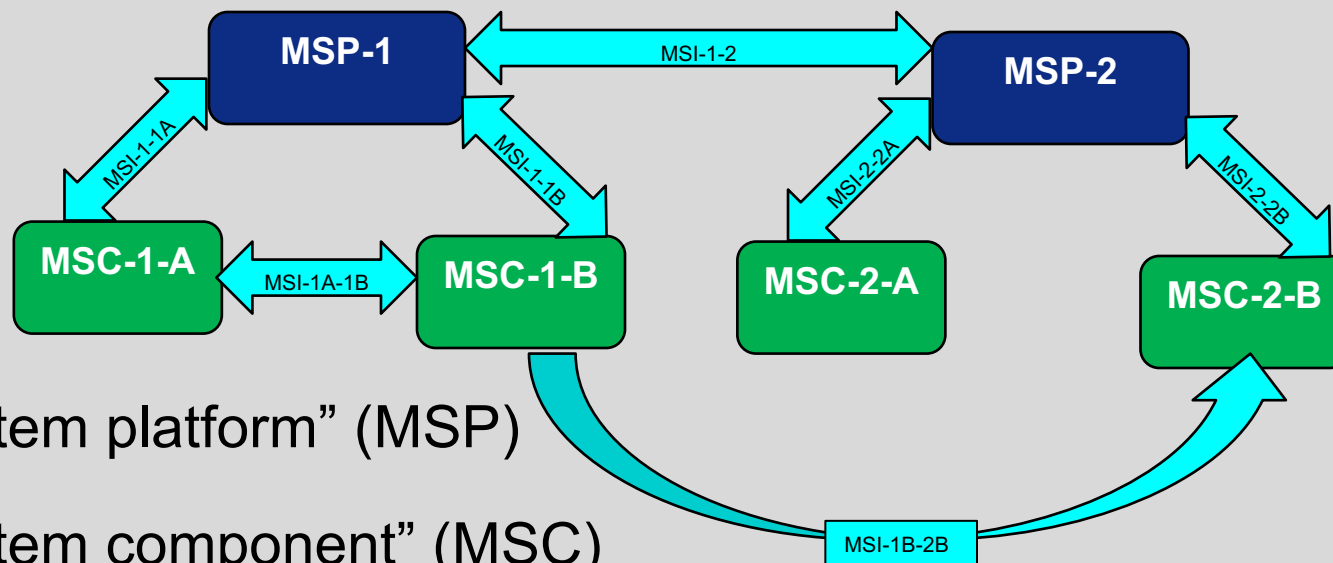
- **Modular Open Systems Approach (MOSA) in Development of [Major] Weapon Systems ([M]WS) →**
new Subchapter I, of new Chapter 144B, of Title 10
- § 2446a – “Requirement for [MOSA] in [MDAPs]; definitions”
- § 2446b – “Requirement to address [MOSA] in program capabilities development and acquisition weapon system design”
- § 2446c – “Requirements relating to availability of major system interfaces (MSI) and support for [MOSA]”

§ 2446a – “REQ’T FOR [MOSA] IN [MDAPs]; DEFINITIONS”

- (a) Requirement: “[An MDAP] receiving [MS-A] or [MS-B] approval after [01 Jan 19] shall be designed & developed, *to the maximum extent practicable*, with a [MOSA]”

- (b) Definitions

- (1) “[MOSA]”
- (2) “major system platform” (MSP)
- (3) “major system component” (MSC)
- (4) “major system interface” (MSI)



§ 2446b – REQ'T TO ADDRESS [MOSA] IN PROGRAM CAPABILITIES DEV'T & ACQUISITION WEAPON SYSTEM DESIGN

(a) Program Capability Document. Shall –

- Identify req'ts likely to evolve; and if so, minimum nec'y for IOC

(b) Analysis of Alternatives. Shall –

- Consider evolutionary acq, prototyping, and MOSA

(c) Acquisition Strategy. Shall --

- Describe the MOSA in detail; *including how to address IP & related issues, such as necessary TD deliverables*

(d) Request for Proposals.

- RFPs for MDAP development & production phases shall describe the MOSA and minimum set of MSC's that must be included in the design

(e) Milestone B. Is prohibited until the MDA determines--

- All MSIs are clearly defined; MSI's are consistent with widely supported & consensus-based standards (if available & suitable); and USG has "*arranged to obtain appropriate and necessary IP rights WRT the MSIs upon completion of the development of the MSP*"

§ 2446C – REQUIREMENTS RELATING TO AVAILABILITY OF MAJOR SYSTEM INTERFACES (MSI) AND SUPPORT FOR [MOSA]

The Secretary of each Military Department shall –

(1) Coordinate --

- with other DoD components, standards orgs, and, as appropriate the intelligence community--
- Re the specification, identification, dev't, and maintenance of MSIs & standards for MSPs

(2) Ensure that MSIs incorporate --

- Commercial and other consensus-based standards that are validate, maintained and published by recognized standards-setting organizations, *to the maximum extent practicable*

(3) Ensure sufficient systems engineering & development --

- Expertise and resources are available to support MOSA in req'ts dev't & Acq program planning

(4) Ensure necessary planning, programming, and budgeting to--

- Specify, develop, and maintain the MOSA, the associated MSIs, system integration, and additional program activities necessary to sustain innovation & interoperability

(5) Ensure adequate training on MOSA is provided to—

- Members of the requirements and acquisition workforce

SEC. 809 -- AMENDMENTS RELATING TO TECHNICAL DATA RIGHTS

■ Part 1: Five “Do-overs” re Sec. 815 of the NDAA for FY12

1) Authorized release & use of Limited Rights TD:

- “[only?] interface data ... necessary for [segregation/reintegration]”
(2320(a)(2)(D)(i)(II))

2) Mixed Funding – rights determined by negotiation--

- whenever practicable (restores pre-2012 language; note no DFARS revision)

3) Deferred Ordering Period: 6yrs

- (rather than perpetual) (2320(b)(9))

4) Deferred Ordering Data Part 1: only data “generated” under the K

- (eliminate the “or utilized” criterion) (2320(b)(9))

5) Deferred Ordering Data Part 2:

- all interface-necessary-for-segregation/reintegration data, and/or “major systems interface” data may be ordered, regardless of USG development funding
(2320(b)(9)(B)(ii))

NDAA FOR FY17 – SEC. 809

(VERSION: CONFERENCE REPORT – S. 2943)

■ Part 2: Four Revisions to 2320 to support Modular Open Systems Approaches (MOSA) (see Sec. 805 for new MOSA statutes)

- 1) **Authorized release & use of Limited Rights TD Related to Interfaces—**
 - includes “data pertaining to **an interface** between and item or process and other items or processes **necessary for segregation ... and reintegration...**” (2320(a)(2)(D)(i)(II))
- 2) **GPR in MSIs Developed Exclusively at Private Expense (DEPE) or With Mixed Funding:**
 - USG will receive GPR in any major system interface (MSI) developed exclusively at private expense (DEPE) and used in a MOSA pursuant to new 10 U.S.C. 2446a (2320(a)(2)(B) and new (a)(2)(E)).
 - *The MSI must be identified in the contract.*
 - *For MSI that was DEPE (and DoD asserts GPR), DoD and Contractor must negotiate for “appropriate and reasonable compensation for such [TD].”*
- 3) **GPR in Any Interface Developed with Mixed Funding:**
 - USG gets GPR in all TD pertaining to **any** “interface between an item or process and other items or processes,” unless DFARS specifies criteria to allow negotiation of other rights. Default GPR applies regardless of the other amendments to the mixed funding paragraph (¶ (a)(2)(E))
- 4) **Deferred Ordering Data:** all **interface-necessary-for-segregation/reintegration** data, and/or **MSI** data may be ordered, regardless of USG development funding (2320(b)(9)(B)(ii))

(*NOTE: Re-Integrated ☺ or added by Sec. 809(f) of the NDAA for FY17 (Conf. Rpt. for S.2943))

SELECTED REVISIONS TO 2320

■ Two all-new rights-allocations added at 2320(a)(2):

“(F) Interfaces developed with mixed funding. Notwithstanding subparagraph (E), the United States shall have government purpose rights in technical data pertaining to an interface between an item or process and other items or processes that was developed in part with Federal funds and in part at private expense, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiation of different rights in such technical data would be in the best interest of the United States.

“(G) Major system interfaces developed exclusively at private expense or with mixed funding. Notwithstanding subparagraphs (B) and (E), the United States shall have government purpose rights in technical data pertaining to a major system interface developed exclusively at private expense or in part with Federal funds and in part at private expense and used in a modular open system approach pursuant to section 2446a of this title [10 USCS § 2446a], except in any case in which the Secretary of Defense determines that negotiation of different rights in such technical data would be in the best interest of the United States. Such major system interface shall be identified in the contract solicitation and the contract. For technical data pertaining to a major system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data.”

BACKUP SLIDES

Validation of Asserted Restrictions

**[How / Why] Does
modularity & segregability
matter?**

MODULARITY & SEGREGABILITY IN THE VALIDATION RULES

- How frequently do the terms “modular[ity]” (M) and “segrega[tion/bility]” (S) appear in the validation rules?

Validation Rule Source:	Hits:	
	M	S
10 USC 2321	0	0
Technical Data (227.7102-3, 227.7103-13; & 252.227-7037)	0	0
Noncommercial Computer Software (227.7203-13; 252.227-7019)	0	0
<i>Gut check – are they anywhere? Check the rights-allocation rules:</i>	-	-
• 10 USC 2320 (see ¶¶ (D)(i)(II), (F), & (G) of ¶ (a)(2))	2	1
• 227.71 (see 227.7103-4(b))	0	2
• 227.72 (see 227.7203-4(b))	0	2
• 252.227-70XX (but see def’n DEPE @ -7013(a)(8)(i), -7014(a)(8)(i), -7018(a)(9)(i))	0	0

- So ... do I really need to care about this in the context of a challenge & validation of asserted restrictions?

SEGREGABILITY IN VALIDATIONS

- **Segregability as the basis for allocating rights (and thus the basis for most categories of asserted restrictions)**
 - **Source of Funding Determinations:** foundation of rights-allocations (for all TD, and noncommercial CS)
 - **Segregating by “data type”:** OMIT, FFF, ... and coming soon Interface-necessary-for-S/R, and Major Systems Interface

- **Segregability “at the clause level” – what rules apply?**
 - **Which quadrant of the Data Rights Quad Chart?**
 - TD or CS? Commercial or Non-commercial?
 - Governs **both** the rights-allocation clauses, and the validation clauses (and whether there even is any applicable clause, e.g., none for CCS)
 - **Expressly:** TD re commercial item, with any portion of development at USG funds (227.7102-4, and .7103-6(a))

MODULARITY IN VALIDATIONS

■ New MOSA-specific data types, and rights-allocations from FY17 NDAA:

- **Exception to Limited Rights:** TD "...pertaining to an interface between and item or process and other items or processes necessary for segregation ... and reintegration..." (2320(a)(2)(D)(i)(II))
- **GPR in MSIs Dev'd Exclusively at Private Expense (DEPE) or W/Mixed Funding** (2320(a)(2)(G)):
- **GPR in Any Interface Developed with Mixed Funding:** (2320(a)(2)(F))

■ **Deferred Ordering Data:** all interface-necessary-for-segregation/reintegration data, and/or MSI data may be ordered, regardless of USG development funding (2320(b)(9)(B)(ii))

- And delivery can be compelled, then the deliverable is subject to the validation procedures (assuming the data is of the type that is subject to validation)

■ **Presumption of Development Exclusively at Private Expense for TD pertaining to a commercial item**

- 10 USC 2320(b)(1), 2321(f); DFARS 252.227-7037(b)

REMINDER: FY 16 NDAA – IP/DATA RIGHTS PROVISIONS

- Sec. 813(a) –Presumption of Dev't Funding for Major Weapons Systems acquired as Commercial Items (and COTS, and modified-COTS)
- **Sec. 813(b) – the Govt-Industry Advisory Panel**
- Sec. 821(a)(1) – Acq Strategy must include an IP Strategy (see 10 USC 2431a(c)(2)(F))
- **Sec. 875 – Independent Review of DoD IP regs, policies, and practices**

NDAA FOR FY 2016 -- SEC. 875

INDEPENDENT REVIEW OF DoD IP RIGHTS REGS, POLICIES, PRACTICES

“SEC. 875. REVIEW OF GOVERNMENT ACCESS TO INTELLECTUAL PROPERTY RIGHTS OF PRIVATE SECTOR FIRMS.

“(a) REVIEW REQUIRED.—

“(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall enter into a **contract with an independent entity** with appropriate expertise to conduct a **review** of—

“ (A) Department of Defense **regulations, practices, and sustainment requirements** related to Government **access to and use of intellectual property rights** of private sector firms; **and**

“(B) Department of Defense practices related to the **procurement, management, and use of intellectual property rights to facilitate competition in sustainment of weapon systems throughout their life-cycle.**

“(2) CONSULTATION REQUIRED.—The contract shall require that in conducting the review, the independent entity shall consult with the National Defense Technology and Industrial Base Council (described in section 2502 of title 10, United States Code) and each Center of Industrial and Technical Excellence (described in section 2474 of title 10, United States Code).

“(b) REPORT.—Not later than March 1, 2016, the Secretary shall submit to the congressional defense committees a report on the findings of the independent entity, along with a description of any actions that the Secretary proposes to revise and clarify laws or that the Secretary may take to revise or clarify regulations related to intellectual property rights.”

■ **The Report is publicly available at ([Click HERE](https://www.ida.org/idamedia/Corporate/Files/Publications/IDA_Documents/SFRD/2017/P-8266.pdf)):**

https://www.ida.org/idamedia/Corporate/Files/Publications/IDA_Documents/SFRD/2017/P-8266.pdf

SEC. 875 REPORT -- RECOMMENDATIONS

1. Make sustainment and acquisition of related IP data and rights a high priority in DOD management and oversight of acquisition programs.
2. Establish or expand existing organizational capabilities within the DOD components to provide expertise in the acquisition of IP data and rights to program managers throughout their programs' lifecycles.
3. Require DOD acquisition programs that are largely dependent on sole-source contracts to OEMs for sustainment to conduct a Business Case Analysis of options to transition to a competitive model for sustainment (maintenance and supply). The results should be forwarded to service acquisition executives together with a recommended strategy to obtain the necessary IP data and rights.
4. State as a matter of policy that DOD acquisition programs that use commercial derivative aircraft should maximize use of data provided for FAA-certified aircraft under FAA regulations to facilitate competition for maintenance and supply of parts for systems and components.
5. Establish under OSD auspices an ongoing DOD advisory group to identify and, in consultation with industry, seek resolution of ambiguities and disagreements in terms and provisions related to DOD sustainment needs, particularly those involving access to and use of intellectual property. The group should be tasked to develop an appendix to the Defense Federal Acquisition Regulations that would specify in greater detail the meaning of such terms as "operation, maintenance, installation training" data; "form, fit and function" data; and "detailed manufacturing and process" data. [Footnote: A model for such an appendix is the appendixes to FAA regulations regarding Instructions for Continued Airworthiness Data (14 Code of Federal Regulations (CFR), Part 33)]
6. DOD should conduct an assessment of DOD acquisition and sustainment specifically focused on alternative approaches for contracting and overseeing the development, procurement, and sustainment of weapon systems under severely limited competition.

INTRODUCTION: THE SEC. 813 PANEL'S CHARGE

- **Government Industry Advisory Panel**

- Established under section 813(b) of FY2016 NDAA, as modified by section 809(f) of FY 2017 NDAA
- Providing recommendations for changes to technical data laws, regulations and policies

- **Report presented to Secretary of Defense**

- Sent on November 13, 2018

- **SECDEF, within 60 days of receiving report, shall submit a copy of report and any comments or recommendations to the congressional defense committees**

- Still in process

SEC. 813(b) OF THE FY 2016 NDAA

- **“The Government-Industry Advisory Panel”**
 - Federal Advisory Committee Act (FACA)
 - “Balanced” membership from Government, industry, academia
 - Panel will develop recommendations for changes to the DoD data rights statutes (10 U.S.C. § 2320 & 2321) and implementing regulations (DFARS Subparts 227.71 & .72)
 - Panel’s report to be submitted to DoD and congressional committees
- **Congress will consider findings & recommendations for any statutory changes**
- **DoD will consider findings & recommendations for changes to the implementing regulations (DFARS), policy, practice, training**

GOVERNMENT-INDUSTRY ADVISORY PANEL OPERATIONS

■ Panel included

- Government members (Office of the Secretary of Defense, the three military departments, and the legal, acquisition, logistics, and research and development communities).
- Industry members as Special Government Employees (large and small businesses, traditional and non-traditional Government contractors, prime contractors and subcontractors, suppliers of hardware and software, and institutions of higher learning).
- Chair: Richard Ginman

■ All Panel meetings & activities were open to the public

- Presentations, Written Comments, etc. are still available on the FACA website
 - <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzjuAA> A ([Click Here](#))
- Substantial input from industry and Government during meetings and in response to Request for Information published in Federal Register

OVERVIEW: WHAT IS NEXT (PROCEDURALLY)

- Panel issued its report to Hill & DoD – November 13, 2018
- DoD combined review & recommendations – due 60 days later
 - Sec. 813 Panel Report
 - Sec. 875 Independent Review
- Congress determines whether to pursue statutory changes
 - 10 USC 2320 & 2321
 - “Stand-alone” sections in next available NDAA
- DoD implementation plan for revisions to
 - DoD Policy
 - Guidance and Training
 - DFARS -- pursue a joint DoD-public rule *drafting* process
 - DoD issues strawman draft, holds public meeting to discuss, revise
 - After drafting – rule still must go through formal publication/rulemaking



2018 REPORT
GOVERNMENT-INDUSTRY
ADVISORY PANEL ON
TECHNICAL DATA RIGHTS
NOVEMBER 13, 2018

OVERVIEW OF RECOMMENDATIONS

- **Very limited changes to statutes (being recommended)**
 - In favor of retaining or increasing current flexibility
 - Stand-alone requirements for pilot program regarding evaluation/valuation of IP; improved training
- **Re-emphasize “specifically negotiated license rights” (SNLR) – more proactive negotiation of key elements**
 - Deliverables
 - License rights
 - [Major Systems] Interfaces & MOSA
- **Focus: Evaluation & Valuation of IP during source selections**
- **Long Term planning for sustainment & “contingent” deliverables & rights**
 - Priced contract options (for longer periods? Up to 20 years?)
 - Escrow arrangements

813 PANEL REPORT: EXECUTIVE SUMMARY

- Introduction
- (1) Business Model Concerns
- (2) Acquisition Planning & Requirements:
- (3) Source Selection:
- (4) Balancing the Interests of the Parties:
- (5) Implementation Concerns:
- (6) Compliance & Administrative Concerns:
- (7) Data Acquisition Concerns:
- (8) Modular Open Systems Approaches (MOSA):
- Note: Issues Referred to the 809 Panel
 - Members of the 813 Panel met with the 809 Panel and shared eight areas where the panel believed it would be appropriate for the 809 Panel to make recommendations. (see Appendix C)

THEMES, ISSUES ... AND SOLUTIONS

- **Delivery of tech data & software – not just license rights**
- **Timing – early, early, early – now! Plan for later**
- ***Improved Communications with Industry****
- ***IP Valuation and Evaluation (Source Selection)****
- **MOSA -- Modular Open Systems Approaches**
- **Negotiations – specialized deals – soon to be the norm**
- **IP Strategies – early, continuous, and integrated**
- **Education and Training – essential to implement**

STATUTORY RECOMMENDATIONS: OVERVIEW

■ Legislation (unanimous)

■ Recommendations for 10 USC 2320 or 2321

- Authorized release and use of limited rights technical data (Paper 11)
- The Validation Process is Cumbersome and Confusing (Paper 18a)
- Small Business Innovation Research (SBIR) (Flow-down to Suppliers; Inability to Share with Primes; Evaluation) (Paper 21)
- Time Limits on Priced Contract Options (Paper 25)
- GPR in Interfaces Developed with Mixed Funding (Paper 30)

■ Stand Alone Provisions (e.g., next available NDAA)

- Lack of Trained Personnel (Paper 22) (partially implemented in the FY2018 NDAA)
- Data Rights as an Evaluation Factor (Paper 4)
- Treatment of Independent Research and Development (IR&D) versus Self-Funded Research and Development (SFR&D) for Intellectual Property (IP) rights determinations; IR&D risk correct for limited/restricted rights? (Paper 7)

■ Legislation (Majority/Minority report)

- Development versus Adaptation (Paper 14a) with Minority report (Paper 14b)
- Mandatory flow-down (commercial subs and suppliers) (Paper 19a) with Minority report (Paper 19b)
- Deferred ordering period: 6 years (rather than perpetual) and Deferred Ordering Part 1: only data “generated” under the contract (Paper 24a) with Minority Report (Paper 24b)

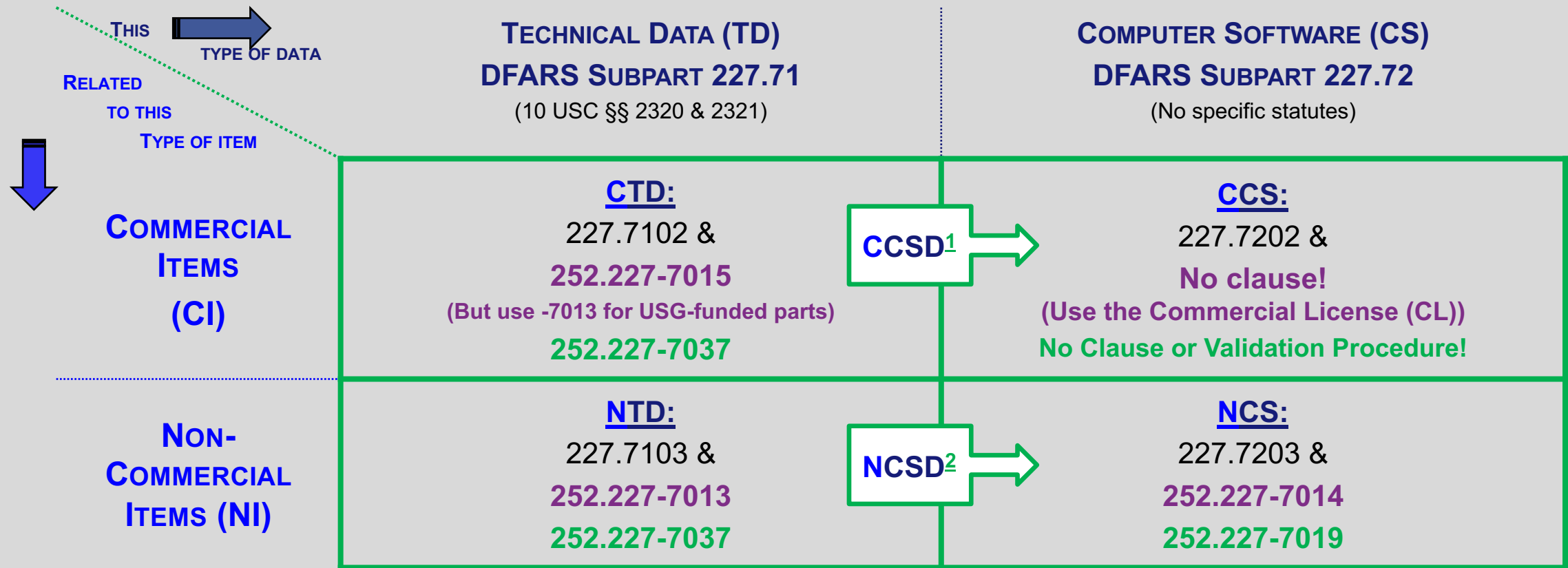
SEC. 875 REPORT -- CONCLUSIONS

- In the past, acquisition decision-makers in both OSD and the military departments have failed to focus sufficient attention on identifying and accessing the intellectual property needed for weapon systems sustainment. There is recent evidence of improvement, but it is too early to assess whether those efforts are sufficient.
- Lack of access to IP data with appropriate rights inhibits DOD's ability to use competitive contracting for repair parts, maintenance and follow-on production, and likely translates into higher long-term sustainment costs.
- Acquisition program management often has not given IP for sustainment adequate or appropriate attention.
- Ambiguous terms and loosely defined constructs impair the implementation of IP for sustainment.
- Use of FAA maintenance data for DOD commercial derivative aircraft can be expanded and could result in substantially lower sustainment costs for these aircraft.
- Depot maintenance capabilities required by law may not be met because of a lack of necessary technical data and software; the use of OEM-based, public-private partnerships do not ameliorate that deficiency.
- Buy-in development and production contracts can result in OEM lock-in of sole-source sustainment franchises.

SEC. 875 REPORT – BROADER CHALLENGES

-
- Renewed focus in DOD on reducing sustainment costs may provide incentives for programs to address IP early, but this creates broader challenges:
 - There is a vast legacy of defense systems, amounting to billions of dollars in sustainment costs, for which the necessary IP data and rights for organic depot or competitive sustainment were not acquired.
 - Future defense systems for which there is little, if any, competition will give DOD little leverage to negotiate acquisition of IP early in the program.
 - Although fostering innovation, systems developed by a defense vendor exclusively at their own expense, as was the case for several unmanned air systems, often provide limited data rights to DOD, hindering sustainment by anyone other than the OEM.
 - Purely commercial technologies, including a vast array of software products that DOD is increasingly using, provide only the same access to IP that commercial customers have, unless DOD can negotiate more extensive rights. This challenges DOD sustainment concepts.
 - These challenges, largely the result of the diminished competitive environment for defense weapon systems, raise the following question: Has the point been reached at which the underlying assumptions of competitively bid contracts are of decreasing validity? If true, this presents DOD with a serious problem that would require new thinking about the laws and regulations governing IP for DOD weapon systems and their sustainment.
-

THE DFARS DATA RIGHTS “QUAD-CHART”



1. CCSD is NOT treated like (any/every) other type of CTD; CCSD is treated the same as the CCS it relates to
2. NCSD is NTD, but it is covered by the clauses & subsection that covers the NCS (that the NCSD relates to)
3. All TD or CS must “fit” into one of these four blocks – and the blocks are mutually exclusive
4. Within each block – The governing DFARS Section is listed on top, in black; The “primary rights allocation clause” is below, in **bold-purple text**; and the validation of asserted restrictions clause is in **bold-green text**

THE DFARS DATA RIGHTS “QUAD-CHART”

<p>THIS ↓ RELATED TO THIS</p> <p>TYPE OF DATA ↓ TYPE OF ITEM</p>	<p>TECHNICAL DATA (TD) DFARS SUBPART 227.71 (10 USC §§ 2320 & 2321)</p>	<p>COMPUTER SOFTWARE (CS) DFARS SUBPART 227.72 (No specific statutes)</p>
<p>COMMERCIAL ITEMS (CI)</p>	<p><u>CTD:</u> 227.7102 & 252.227-7015 (But use -7013 for USG-funded parts) 252.227-7037</p>	<p><u>CCS & CCSD^{1:}</u> 227.7202 & No clause! (Use the Commercial License (CL)) No Clause or Validation Procedure!</p>
<p>Non- COMMERCIAL ITEMS (NI)</p>	<p><u>NTD:</u> 227.7103 & 252.227-7013 252.227-7037</p>	<p><u>NCS & NCSD^{2:}</u> 227.7203 & 252.227-7014 252.227-7019</p>

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RETROSPECTIVE: WHAT ISSUES OR CONCERNS PROMPTED SEC. 815?

■ Example #1: “DoD - you waited too long ... *Gotcha!*”

- DoD funds development of technology in whole or in-part
 - DFARS clauses – Return on Investment (ROI) scheme grants the USG either Unlimited Rights (UR) or Govt Purpose Rts (GPR)
- No DFARS requirement for immediate delivery of data → USG has “inchoate” (unperfected) rights
- DoD requests delivery later -- when operational need arises:
 - Contractor refuses, or charges significant additional fees
- Safety Net: Deferred Ordering clause - DFARS 252.227-7027
- **Gotcha!** Deferred ordering is ...
 - Not mandatory – many contractors refuse the clause
 - Only available under the K under which the data was first “generated”
 - Three years after creation is ... just not realistically long enough

RETROSPECTIVE: WHAT ISSUES OR CONCERNS PROMPTED SEC. 815?

■ Example #2: “DoD - you waited too long ... *Gotcha! Again!*”

- DoD avoids Ex.1-A above by requiring early/immediate delivery of data anticipated to be needed later for life cycle sustainment
- Buying a data management task: data is OBE as soon as next change in the system design
- Data likely to include both UR/GPR, and data marked as proprietary (Limited Rts (LR), Restricted Rights (RR), Commercial licenses)
- DoD begins using the data significantly later – when operational need arises – and develops reason to believe that some data asserted as proprietary was actually funded by USG ...
- **Gotcha!** DoD’s right to “Validate” such asserted restrictions expires three (3) years after the final payment or delivery of the data (10 U.S.C. § 2321 → all TD via DFARS 252.227-7037, extended to NCS via 252.227-7019)

RETROSPECTIVE: WHAT ISSUES OR CONCERNS PROMPTED SEC. 815?

- **Example #3: Form, fit, and function (FFF) data -- “You keep on using that [phrase] – I do not think it means what you think it means”* ... Gotcha!**
 - DoD uses a Modular Open Systems Approach (MOSA)!!!
 - “Doctrine of Segregability” → contractor allowed to “fence off” & protect proprietary modules throughout the system
 - DoD seeks FFF delivered for proprietary modules
 - Win-Win! Proprietary modules treated as “black boxes”
 - No delivery of detailed (proprietary) information re the “innards” of the black box
 - FFF enables a “plug-and-play” approach to use another vendor’s product
 - Un-plug (remove, uninstall, or “segregate”) the OEM’s original proprietary black box
 - Identify and **competitively** acquire alternative physically- and functionally-equivalent boxes
 - Plug-in (install, insert, integrate, or “reintegrate”) a new box → and Play!
- **Gotcha!**
 - OEM contractor asserts that certain data is “too detailed” to qualify as FFF – most typically data describing the [interface](#) between the black box and other components
 - DoD cannot obtain the necessary data, or cannot release the data if delivered

* Adapted from I. Montoya, in *The Princess Bride*

HOW DID SEC. 815 SEEK TO ADDRESS THESE ISSUES/CONCERNS?

■ Part 1: “Segregation and Reintegration Data” (S/R Data)

- DoD guaranteed ability acquire the data “necessary to” enable the “black box” and “plug-and-play” approach to proprietary modules
- Presume legitimate assertion & dispute that in some cases, the data necessary to enable this approach is “too detailed” – it is not equitable to force delivery as FFF data with Unlimited Rts (UR)
 - In these cases, the approach requires both (i) FFF, and (ii) S/R Data
- Default License Rights in this “next level” (perhaps “FFF-plus” or “FFF+”) depend on development funding – no automatic grant of UR based on the data type
- If Limited Rights, DoD is allowed to release/use of such data only for these activities – described generically as “segregation” and “reintegration”
- DoD must also have the ability to compel delivery of this data → nice segue →

HOW DID SEC. 815 SEEK TO ADDRESS THESE ISSUES/CONCERNS?

■ Part 2: A More Balanced Approach to Deferred Ordering

- **Primary Focus:** enabling DoD to **obtain data it has paid to develop** the technology (in whole or in part) -- and thereby equitably entitled to UR or GPR
 - Only exception: data necessary for the “segregation and reintegration” approach (MOSA, black box, plug-and-play)
- DoD must have an actual **critical DoD mission need for the data** – to support a major system, weapon system, or noncommercial item
- There will be **no arbitrary time limit** on the ability to get this data
- DoD can order the data in connection with any contract in which the data is still being “utilized” ... regardless of when it was “generated”
- Continue the long-standing approach in DFARS that when subject to deferred ordering, contractor is compensated only for the costs of converting and delivering the data (i.e., no license fee)
- Deferred Ordering is available to DoD as a matter of right – it is not optional or negotiable when the criteria for ordering are applicable

ISSUES & OPTIONS FOR DEFINING “SEGREGATION & REINTEGRATION [DATA]”

- A new “data type” ... or a purpose-based limitation on use/release ... or both?
 - Purpose Limitation → on the authorized release of Limited Rights TD: “[USG] may release or disclose to persons outside the Government, or permit the use of [TD] by such persons, if ... **such release, disclosure, or use ... is necessary for** ... segregation ... or reintegration ...” (10 U.S.C. § 2320 (a)(2)(D)(i)(II))
 - Data Type → one of the elements of the mandatory DoD “determination” for exercising deferred ordering – if “the **technical data ... is necessary for** ... segregation ... or reintegration ...” (10 U.S.C. § 2320 (b)(9)(B)(ii))
- Approach: “necessary-for” ... or descriptive-of the TD?
 - Defined as whatever TD is “necessary for” a certain purpose (e.g., “OMIT Data”)
 - Descriptive Definition – describe the nature, character, quality, level of detail, etc. of the data (e.g., FFF, or DMPD)
- Common (Preferred?) Three-Pronged Structure for a Definition:
 - 1) Objective statement of the core definitional criteria
 - 2) Inclusive Statement(s): further description of criteria or examples of [stuff] that **DOES meet** the definitional criteria
 - 3) Exclusive Statement(s): further description of criteria or examples of [stuff] that **would NOT meet** the definitional criteria

SEGREGATION OR REINTEGRATION DATA ... AS PROPOSED BY DFARS 2012-D022

■ “SEGREGATION OR REINTEGRATION DATA” -- DEFINED:

“... means technical data or computer software that is more detailed than form, fit, and function data and that is **necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.**

“(1) **Unless agreed otherwise** by the Government and the contractor, the **nature, quality, and level of technical detail necessary** for these data or software shall be that **required for persons reasonably skilled in the art** to perform such segregation or reintegration activities.

“(2) The segregation or reintegration of any such an item or process may be performed **at any practical level, including down to the lowest practicable segregable level**, e.g., a subitem or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function), or documentation.

“(3) The term—

“(i) **Includes** data or software that describes in **more detail (than form, fit, and function data)** the **physical, logical, or operational interface** or similar functional interrelationship between the items or processes; and

“(ii) **May include, but would not typically require, detailed manufacturing or process data or computer software source code** to support such segregation or reintegration activities.]

- **FORM, FIT, AND FUNCTION DATA – DFARS DEFINITION REVISED:** ““Form, fit, and function data” means technical data **[or computer software]** that describes the required overall physical, **[logical, configuration, mating, attachment, interface,]** functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, ~~component~~, or process to the extent necessary to permit identification of physically **and[or]** functionally ~~interchangeable-equivalent~~ items **[or processes. The term does not include computer software source code, or detailed manufacturing or process data.]**

- **Expanded - clause prescription: mandatory** (unless impracticable)
 - “Regulations ... *shall* require that, *whenever practicable*, a contract ...” (pre-existing language at 2320(b))
 - **Current DFARS 252.227-7027:** optional
- **Expanded – no time limit – order may be placed “at any time”**
 - **Current -7027 clause:** limit is 3yrs after contract
- **Expanded – data generated “or utilized” under the contract**
 - **Current -7027 clause** → only if “generated” under the contract
- **DoD must determine that the TD meets BOTH of the following:**
 - 1) Necessary for procurement, sustainment, modification, or upgrade of a major/weapon/noncommercial system, **AND**
 - 2) Is **either**:
 - Development **funded** in whole or in part **by** the **Government** –**OR**–
 - Necessary for segregation or reintegration

DEFERRED ORDERING ... AS PROPOSED BY DFARS 2012-D022

- **Clause Prescription:** new deferred ordering clause (252.227-7029) required for: "...all solicitations and contracts using other than FAR part 12 procedures, and in all solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for (i) A major system or subsystem thereof; or (ii) A weapon system or subsystem thereof.
- **New Definition:** ““Technical data or computer software generated or utilized in the performance of this contract or any subcontract hereunder” means—
 - “(1) Technical data or computer software developed in the performance of this contract or any subcontract hereunder;
 - “(2) Technical data pertaining to an item or process that is developed, delivered, or incorporated into the design of a system, in the performance of this contract or any subcontract hereunder;
 - “(3) Computer software or computer software documentation pertaining to computer software designed, developed, or delivered in the performance of this contract or any subcontract hereunder;
 - “(4) Technical data or computer software used to provide services in the performance of this contract or any subcontract hereunder; or
 - “(5) Technical data or computer software, other than commercially available off-the-shelf software, necessary to access, use, reproduce, modify, perform, display, release, or disclose any of the technical data or computer software identified in paragraphs (1) through (4) of this definition.
- **Disputes:** Contractor assertions that 100% private funding negates the applicability of the deferred ordering right to particular TD or CS is handled under the applicable validation procedures (-7019 or -7037)
- **Retention of Data:** Clause shall not be interpreted as imposing an obligation to retain TD/CS for longer than a reasonable time (although the USG can specify a retention period in the contract)
- **FlowDown:** Clause flows down to subcontractors using the same prescriptive criteria as for inclusion in the prime K

DEFERRED ORDERING ... AS PROPOSED BY DFARS

2012-D022

■ 252.227-7029(b) - implementing the deferred ordering right and restrictions:

“(b) In addition to technical data or computer software specified elsewhere in this contract to be delivered or otherwise furnished hereunder, the Government may at any time order technical data or computer software as follows:

“(1) Except as provided in paragraph (b)(2) of this clause, the Government may require delivery of any technical data or computer software *generated or utilized in the performance of this contract or any subcontract hereunder*,...upon a determination by the Government that the technical data or computer software—

“(i) Is needed for the purpose of development, production, reprocurement, sustainment, modification, or upgrade (including through competitive means) of—

“(A) A major system or subsystem thereof;

“(B) A weapon system or subsystem thereof;

“(C) Any noncommercial item; or

“(D) *Any portion of a commercial item that was either developed exclusively with Government funds or developed with mixed funding, or that was a modification made at Government expense; and*

“(ii) Either—

“(A) *Pertains to an item or process* that was either developed exclusively with Government funds or developed with mixed funding;

“(B) Was generated either exclusively with Government funds or with mixed funding in cases when contract *performance did not involve the development of an item or process*; or

“(C) *Is form, fit, and function data, or* segregation or reintegration data.

“(2) For technical data or computer software resulting from *basic research or applied research*, the Government is not required to make the determination that such technical data or computer software is needed for the purposes set forth at paragraph (b)(1)(i).”

[TECH DATA AND COMPUTER SOFTWARE] **DELIVERABLES AND RIGHTS**
AS “ENABLERS”

■ **Deliverables → the technical or operational enabler**

- Supports or enhances one’s technical or operational capability to engage in a specific activity
- The level or degree of support depends on how well the deliverable is tailored to the desired activity (not necessarily just a matter of the level of detail)

■ **Rights → the legal or contractual enabler**

- The ability to use the delivered TD or CS for a specific activity, or to release to a specific entity (outside the USG/customer) for same
- Use example: LR data can not be used for manufacture ... even by/within the USG
- Release example: LR data & RR software can be released for emergency repairs, to a “covered Governments support contractor”
 - Coming soon to DFARS: for “segregation or reintegration” activities (Sec. 815 of FY12 NDAA)

■ **Question: Which is more important...**

- ...to the contractor/vendor?
- ... to the Government/customer?

- **Legal → [Doctrine of] Segregability as applied to the data rights**
 - Data Rights – licensing necessary to use data/software
 - IP Owner → always allowed to segregate his proprietary (developed exclusively at private expense) technology ... at the lowest practicable segregable level
 - Rendered meaningless without the data/software deliverable
- **Technical (Operational, Functional . . .) → Modularity & OSA**
 - Data Requirements – level of detail needed for specific life cycle activities/purposes
 - Technical Design/Architecture – modular, defined (and open or standard) interfaces between functional systems, subsystems, components
- **Contractual**
 - **Data delivery requirements** → consistent, aligned, supporting the legal segregability and technical modularity
 - Data Rights: Standard DFARS clauses, typical commercial licenses, and negotiated license
 - Challenge: Standard/typical commercial licenses or terms-of-service
- **Overlay: Timing → to support an effective and affordable business model**
 - Data **delivery/rights** needs → downstream
 - IP rights allocation → at development, design, delivery
 - Competition - organic upstream → must be *actively cultivated* later
 - Priced contract options vs. **deferred ordering (or delivery)**

PGI 217.7504 ACQUISITION OF PARTS WHEN DATA IS NOT AVAILABLE.

■ **PGI 217.7504 Acquisition of parts when data is not available.**

When acquiring a part for which the Government does not have necessary data with rights to use in a specification or drawing for competitive acquisition, use one of the following procedures in order of preference:

(1) When items of identical design are not required, the acquisition may still be conducted through full and open competition by using a performance specification or other similar technical requirement or purchase description that does not contain data with restricted rights. Two methods are—

- (i) Two-step sealed bidding; and
- (ii) Brand name or equal purchase descriptions.

(2) When other than full and open competition is authorized under FAR Part 6, acquire the part from the firm that developed or designed the item or process, or its licensees, provided productive capacity and quality are adequate and the price is fair and reasonable.

(3) When additional sources are needed and the procedures in paragraph (1) of this section are not practicable, consider the following alternatives:

- (i) Encourage the developer to license others to manufacture the parts;
- (ii) Acquire the necessary rights in data;
- (iii) Use a leader company acquisition technique (FAR Subpart 17.4) when complex technical equipment is involved and establishing satisfactory additional sources will require technical assistance as well as data; or
- (iv) Incorporate a priced option in the contract that allows the Government to require the contractor to establish a second source.

(4) As a last alternative, the contracting activity may develop a design specification for competitive acquisition through reverse engineering. Contracting activities shall not do reverse engineering unless—

- (i) Significant cost savings can be demonstrated; and
- (ii) The action is authorized by the head of the contracting activity.

DoDI 5000.02 – IP & MOSA

■ DoD Instruction 5000.02, “Operation of the Defense Acquisition System,” Jan 07, 2015 (Incl. Change 4, 8/31/18)

(<http://www.dtic.mil/whs/directives/corres/pdf/500002p.pdf>)

- IP Strategy (IPS) required throughout entire program life cycle (see Encl.1 Table 2 (p.50); Encl 2, ¶ 6.(a)(4) (p.80))
- MOSA required for where feasible and cost-effective (see Encl.1 Table 2 (p.50); Encl 2, ¶ 6.(a)(5) (p.80); Encl. 3, ¶ 14 (pp. 90-91))
- Requires the IP acquisition planning elements of DFARS 207.106 (S-70) for ALL systems
- Product support strategy must be consistent/integrated with IPS (Encl. 6, ¶2.a.(1)(a)5. (p.116); & ¶3.d.(4) (p.120))

DoDI 5000.02 – SELECTED EXCERPTS: IP & MOSA

- **Encl. 2 – Program Mgmt, ¶ 6. Program Mgmt Responsibilities, ¶a. Acquisition Strategies, ¶(4): (p. 80)**

(4) IP Strategy. Program management must establish and maintain an IP Strategy to identify and manage the full spectrum of IP and related issues (e.g., technical data and computer software deliverables, patented technologies, and appropriate license rights) from the inception of a program and throughout the life cycle. The IP Strategy will describe, at a minimum, how program management will assess program needs for, and acquire competitively whenever possible, the IP deliverables and associated license rights necessary for competitive and affordable acquisition and sustainment over the entire product life cycle, including by integrating, for all systems, the IP planning elements required by subpart 207.106 (S-70) of the Defense Federal Acquisition Regulation Supplement (Reference (a1)) for major weapon systems and subsystems thereof. The IP Strategy will be updated throughout the entire product life cycle, initially as part of the Acquisition Strategy, and during the Operations and Support Phase as part of the Life-Cycle Sustainment Plan.

■ **Encl. 2 – Program Mgmt, ¶ 6. Program Mgmt Responsibilities, ¶a. Acquisition Strategies, ¶(5): (p. 80)**

(5) MOSA. Program management is responsible for evaluating and implementing a MOSA to the maximum extent feasible and cost effective. This approach integrates technical requirements with contracting mechanisms and legal considerations to support a more rapid evolution of capabilities and technologies throughout the product life cycle through the use of architecture modularity, open systems standards, and appropriate business practices. The Acquisition Strategy for the system should identify where, why, and how a MOSA will or will not be used in the program.

DoDI 5000.02 – SELECTED EXCERPTS: IP & OSA

■ Encl. 3 – Systems Engineering, ¶ 14 (@ p. 90-91)

14. MODULAR OPEN SYSTEMS APPROACH. Program Managers, with support from the Lead Systems Engineer, are responsible for applying modular approaches in product designs where feasible and cost-effective. They are also responsible for acquiring data and IP that are both appropriate (10 U.S.C. 2320 (Reference (h))) and essential to achieving the expected benefits (see paragraphs 6a(4) and 6a(5) in Enclosure 2 of this instruction for additional information on MOSA and IP). Modular designs coupled with an appropriately open business model provide a valuable mechanism for continuing competition and incremental upgrades, and to facilitate reuse across the joint force.

DoD IP White Paper, “DoD, Innovation, and IP in Commercial & Proprietary Technologies”

- Introduction
- DoD as a Customer, and Perhaps as a Co-Developer
- DoD’s Approach to Protecting IP in Commercial & Proprietary Technologies
- Modularity to Preserve Commercial or Proprietary Interests
 - Modular Licensing (aka “Doctrine of Segregability”)
 - Modular Open Systems Approach (MOSA)
- The Flexibility to Negotiate – In All Cases
- Opening the Dialogue

DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies

Introduction

Technology developers and innovators who invest their time, energy, and imagination in creating and developing a new idea or technology deserve to reap the benefits of their work. The Department of Defense (DoD) recognizes and respects the critical need for these developers to protect and leverage the Intellectual Property (IP) in their works, and our regulations and contracting approaches for acquiring new technology reflect this outlook.


DoD understands that developers often rely on IP rights to ensure return on investment—by retaining and securing *exclusive rights* for future business opportunities involving their innovations. Similarly, when DoD invests in developing technology, we focus on securing IP rights to support our critical needs—although our core strategies typically focus on maximizing *open competition* to support DoD’s future mission needs.

There may be a mistaken impression that these two business models are in conflict and cannot coexist—for example, believing that a developer who accepts a DoD development contract will be unable to retain any form of exclusive rights to commercialize the newly developed IP, or even worse, it could result in the loss of the developer’s exclusive IP rights in the pre-existing

commercial or proprietary technologies that it brings to the development effort. Fortunately, for all of us, that is a myth. The reality is that doing business with DoD is ripe with opportunity, and structured to support a “win-win” business deal for innovative technologies having both military and commercial application.

This paper briefly explores DoD’s unique characteristics as a customer and co-developer; outlines key elements of our IP development policies and regulations designed to ensure protection of commercial and proprietary technology while meeting DoD’s needs; explains the benefits of our modular approach to IP licensing and technical architectures; and reinforces our flexibility to craft specialized business deals and creative solutions with innovative technology developers.

...doing business with DoD is ripe with opportunity, and structured to support a “win-win” business deal for innovative technologies...



DoD IP WHITE PAPER, “DoD, INNOVATION, AND IP IN COMMERCIAL & PROPRIETARY TECHNOLOGIES” (PAGES 2 & 3)

DoD as a Customer, and

DoD leverages leading edge technologies to give our Warfighters an advantage over any potential future adversary. In a military context, we have practical and critical needs to ensure that defense capabilities can operate under adverse conditions, meet our safety objectives, are supportable and maintainable,

DoD as a Customer

When any Government agency purchases a commercial technology, the foundational policy and practice is that the agency will receive only the same IP rights, and the same deliverables, that are typically provided to other commercial customers. If the usual commercial deliverables and licenses do not meet a Government-unique need, for example when technical information is needed to assess risk and mission impact or to maintain and support the system for a longer than usual operational life, then we would seek to negotiate with the commercial vendor for any specialized deliverables or IP rights—on voluntary, mutually acceptable, terms.

DoD’s Approach to Protecting IP in Commercial & Proprietary Technologies

When DoD acquires commercial or proprietary technologies developed *exclusively at private expense*, DoD’s license will typically be either the same commercial license applied to other customers, or the predefined minimum license specified in the DoD regulations—which is limited primarily to internal DoD use, allowing for non-DoD third parties to use that IP only on behalf of DoD in specified, mission-critical or mission-support circumstances (e.g., emergencies, or direct support of DoD’s in-house activities), and subject to numerous legal and practical safeguards to protect the developer’s proprietary rights. The regulations provide additional protections for *commercial* technologies: DoD is required to presume that commercial items were developed exclusively at private expense, and generally to utilize the same deliverables customarily

Co-Developer

dict. These Department information uses. Those situations would on defense customer base.

DoD as a Co-Developer

DoD’s specialized mission requirements may also require further development to extend or adapt a commercial or proprietary technology to address particular operational challenges and threats. When DoD funds the development of new technologies, there are significant benefits for the developer: DoD almost never seeks ownership of the IP developed under a contract, even when funding 100% of the development; and for technology development funded jointly by DoD and Industry, the standard license rights provided in the DoD regulations allow the developer to retain *exclusive rights* for any *commercial* (non-Government) uses for the new technology.

unique clause for Commercial Computer Software, relying instead on the IP owner’s standard commercial license. Exceptions are allowed only if necessary to comply with federal law or to meet military-unique mission needs (or by mutual agreement).

When DoD seeks to meet its military-unique needs by *funding* a specialized adaptation or modification of pre-existing commercial or proprietary IP, any minor modifications or modifications of a type customarily offered in the commercial marketplace do not alter the commercial status of the pre-existing technology; and only those modifications that rise to the level of a new technology “development” could affect the standard license rights granted to DoD in the newly developed

Modularity to Preserve Commercial or Pr

In “mixed funding” development scenarios, such as when DoD funds a specialized modification of a commercial or proprietary technology, the developer may be concerned that it will lose its IP rights in the proprietary components by taking the DoD funding. However, DoD uses a two-part approach to ensure a mutually beneficial business deal:

developer, ensuring not threaten the de on investment.

Modular Open

MOSA is primarily design, which natu

Modular Licensing

When a technology is developed with a mix of DoD and Industry funds, DoD policy ensures that the developer’s self-funded work can be segregated from the DoD-funded work, allowing separate licenses to govern each portion. This preserves the developer’s IP rights to its self-funded portion, while allowing DoD to obtain greater rights to only those subsystems or components that it funded. This policy (the so-called “Doctrine of Segregability”) protects the



open, standard, into seeking only top-le and interface data), information, for pr

The Flexibility to Negotiate—In All Cases

If the ability to follow commercial practices, the standard funding-based license rights provided in the DoD regulations, and the application of MOSA and modular licensing principles still do not result in the best balance of DoD and the Developer’s interests, the parties are

always allowed to n agreement. In addi the form, content, data and software c negotiable.

Opening the Dialogue

DoD is reaching out to technology developers to discuss and explore creative solutions to meet our National security needs through and mutually successful business arrangements. DoD respects the critical need for technology developers to ensure a return on their technology investments, particularly

discussions about these key IP considerations, DoD hopes to ref opportunities and engagement with

IP STRATEGY GUIDANCE

■ One-stop shop:

- For now (08 Oct 14) – the IP Strategy guidance/brochure
- Forthcoming – additional guidance, “focus sheets,” etc.

■ IP Strategy Guidance Brochure (18 Sep 14) (details → next 5 slides)

- The Basics: What, Who, When, Why, and How?
- The Next Level: data delivery vs. data rights; time is of the essence; **modularity, segregability, & OSA**; the “R-P” and “O-C” Models
- Guiding Principles for a *Strategic* Approach to IP Mgmt
- IP Strategy Checklist

GUIDANCE

Intellectual Property Strategy

► What is Intellectual Property?

Intellectual Property (IP) is an expression of a new and useful concept that can be legally protected such that the originator (e.g., inventor, author) is granted certain exclusive rights. The most commonly known forms of IP protection are patents, copyrights, trade secrets, and trademarks, and any or all of these may arise in DoD programs. DoD programs also face IP issues in another specialized form: “data rights.” The term “data rights” is a short-hand way to refer to the license rights that DoD acquires in two types of deliverables: technical data and computer software. This approach allows DoD to use a single set of license rights to address what would otherwise be two separate forms of IP protection: copyrights and trade secrets. The “Understanding and Leveraging Data Rights in DoD Acquisitions” brochure provides an overview of key elements of the DoD approach to data rights and can be found at <https://acc.dau.mil/datarightstrifold>.



► What is an Intellectual Property (IP) Strategy?

The IP Strategy is the program’s approach, which will be captured as part of the program documentation, to managing the IP issues that will affect the program’s cost, schedule, and performance.

The IP Strategy helps a program identify and manage the full spectrum of IP and related issues from the inception of a program and throughout the life cycle, by assessing program needs for, and enabling the competitive acquisition of, deliverables of IP (e.g., technical data and computer software) and the associated license rights necessary for competitive and affordable acquisition and sustainment. Programs will use specific contracting mechanisms (e.g., delivery requirements, priced options for non-commercial IP that can be negotiated prior to contract award, evaluation during source selection), in an affordable manner to better achieve the business objectives of the program.



An IP Strategy is needed to take advantage of innovation and to provide fair compensation.

An IP Strategy will give program offices greater ability to control the life cycle development and acquisition of warfighting systems.

► Who is responsible for the IP Strategy?

Program management is ultimately responsible for pulling it all together, subject to approval by the Milestone Decision Authority, but this must be a team effort. The development and continuous updating of an effective and robust IP Strategy will require active participation of subject matter experts from a wide variety of disciplines, including engineering, logistics, contracting, cost and accounting, and legal.



► When is an IP Strategy Prepared?

The IP Strategy is required for all program types covered by DoDI 5000.02 (MDAPS, MAIS, and all other acquisition categories) starting at Milestone A, and is required to be updated as appropriate throughout the remainder of the entire program life cycle. Initially, the IP Strategy is to be summarized in the Acquisition Strategy. During the Operations and Sustainment phase, it is to be presented with the Life Cycle Sustainment Plan.



ACQUISITION LIFE CYCLE			
ANALYSIS	DEVELOPMENT	PRODUCTION	OPERATIONS & SUSTAINMENT
IP STRATEGY	→	→	→

*Revisions as needed over the life cycle

► How does IP affect competition?

In DoD programs, system designs often include at least some technologies that are subject to privately-owned IP rights, commonly referred to as “proprietary” technology. The IP rights generally grant exclusive rights to IP owners to use their innovations, which may restrict or conflict with full and open competition. (The IP owner may be the sole source for a technology or may be legally entitled to compensation for use by anyone else.) Nevertheless, IP rights can co-exist or be integrated into a competitive environment, with some advance planning. In these cases, the IP Strategy will help the program take appropriate steps to promote competition to the maximum extent practical, and avoid or mitigate scenarios in which a relatively small amount of proprietary technology restricts the re-procurement or sustainment of the system or system elements.

■ The Next Level (Page 2, cont'd →)

- **It Takes Two:** *Delivery Requirements and IP License Rights*
- **Time is of the Essence:** *Act Now for Future Flexibility*
- **Be Prepared: “Segregability,” Modularity, and Open Systems Architecture**
 - **Segregability Part I: The Bad News**
 - **Segregability Part II: The Good News**
 - Table: the Restricted-Proprietary (R-P) Model and The Open-Competitive (O-C) Model (→ next slide)

NDAA FOR FY 2016 -- SEC. 813(a)

MWS ACQUIRED AS COMMERCIAL ITEMS → PRESUME DEV'T AT PRIVATE \$\$

“SEC. 813. RIGHTS IN TECHNICAL DATA.

“(a) **RIGHTS IN TECHNICAL DATA RELATING TO MAJOR WEAPON SYSTEMS.**—Paragraph (2) of section 2321(f) of title 10, United States Code, is amended to read as follows:

“ “(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor for a major system or a subsystem or component thereof on the basis that the **major weapon system, subsystem, or component** was developed exclusively at private expense—

““(A) the **presumption** in paragraph (1) shall apply—

“ “(i) with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item in accordance with **section 2379(a)** of this title;

“ “(ii) with regard to a component of a subsystem, if the subsystem was acquired as a commercial item in accordance with **section 2379(b)** of this title; and

““(iii) with regard to any other component, if the component is a **commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements**; and

“ “(B) in all other cases, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.”.”

■ **NOTE: Implemented by DFARS Case 2016-D008:** proposed rule at 81 FR 28812 (5/10/16); final rule (unchanged) at 81 FR 65565 (9/23/16)

REVIEW - FY 12 NDAA – SECTION 815: KEY ELEMENTS

- **New “Type” of Data: Necessary for Segregation & Reintegration**
 - Details in slides to follow →

- **Expanded (and restricted) Deferred Ordering scheme**
 - Details in slides to follow →

- **Validation of Asserted Restrictions**
 - Challenge period is now 6 years after contract (current = 3yrs)
 - No time limit for assertions based on fraud

- **Housekeeping**
 - Government Purpose Rights (GPR) is default for mixed funding
 - Repeal FY11 § 824’s attempted slaughter of IR&D rules

SO, WHAT IS . . . SEGREGATION OR REINTEGRATION DATA?

■ SEC. 815 - SEGREGATION OR REINTEGRATION DATA:

- “. . . is **necessary for** the segregation of an item or process from, or the reintegration of that item or process (or a **physically or functionally equivalent** item or process) with, other items or processes” (10 U.S.C. § 2320 (a)(2)(D)(i)(II), and (b)(9)(B)(ii) (as amended by Sec. 815))

■ COMPARE: FORM, FIT, AND FUNCTION DATA:

- **DFARS**: “. . . data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of **physically and functionally interchangeable** items.” (DFARS 252.227-7013(a)(11) (FEB 2014))
- **FAR**: “. . . data relating to items, components, or processes that are **sufficient to** enable physical and functional interchangeability, and data identifying source, size, **configuration, mating, and attachment** characteristics, functional characteristics, and performance requirements. For **computer software** it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.” (FAR 52.227-14(a) (DEC 2007))

Note: Additional details & Bonus Coverage in the Backup Slides

SO, WHAT IS . . . SEGREGATION OR REINTEGRATION DATA?

■ COMPARE: “OMIT” DATA:

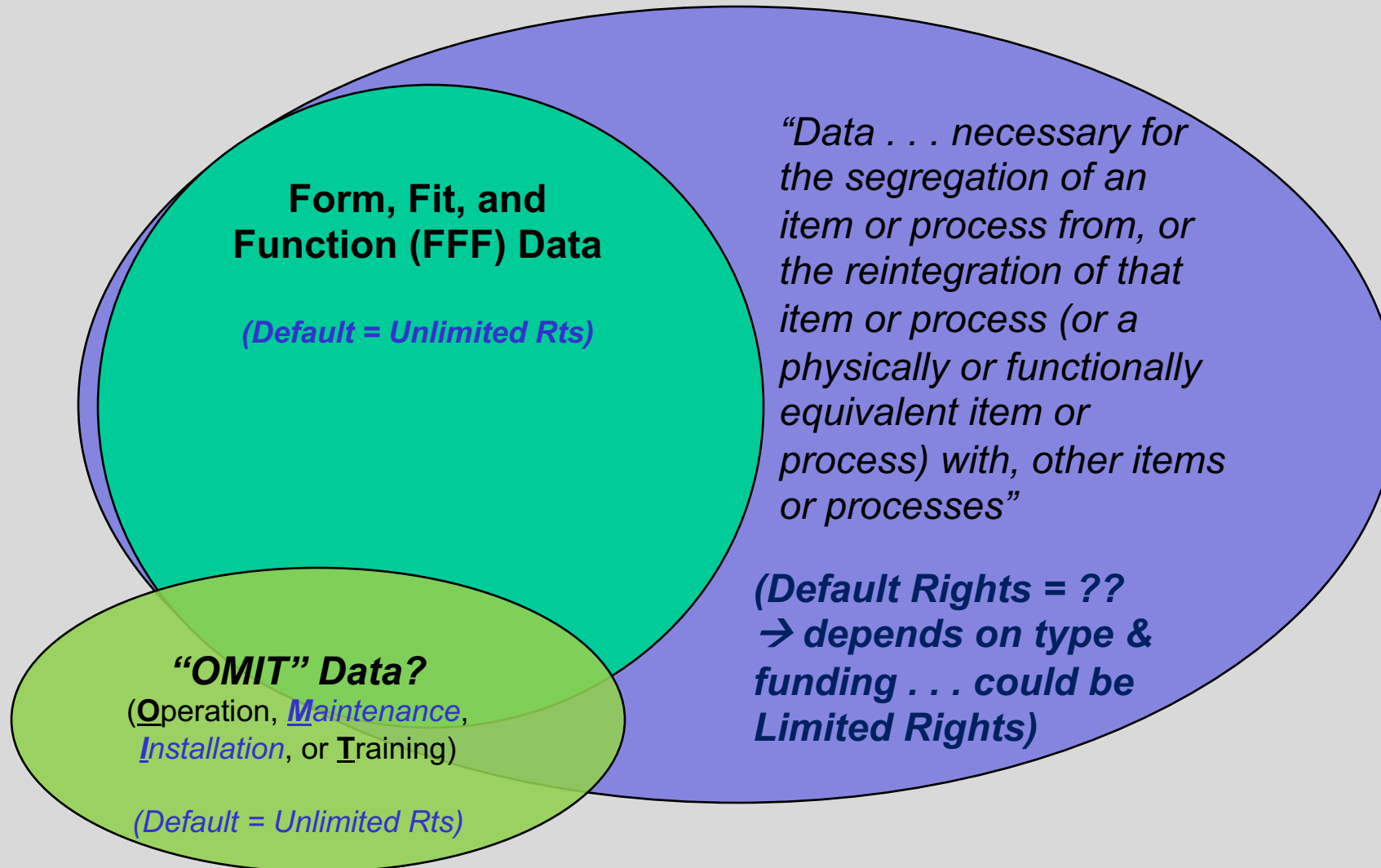
- “technical data that is . . . **necessary for [O]peration, [M]aintenance, [I]nstallation, or [T]raining (*other than detailed manufacturing or process data*)**” (10 U.S.C. § 2320 (a)(2)(C)(iii))
- Not defined, per se → listed as an exception to funding-based allocation of rights – the USG is entitled to Unlimited Rights (UR) in OMIT data, regardless of who funded the development of the technology to which the data pertains/relates

■ COMPARE: “DETAILED MANUFACTURING OR PROCESS DATA” (“DMPD”):

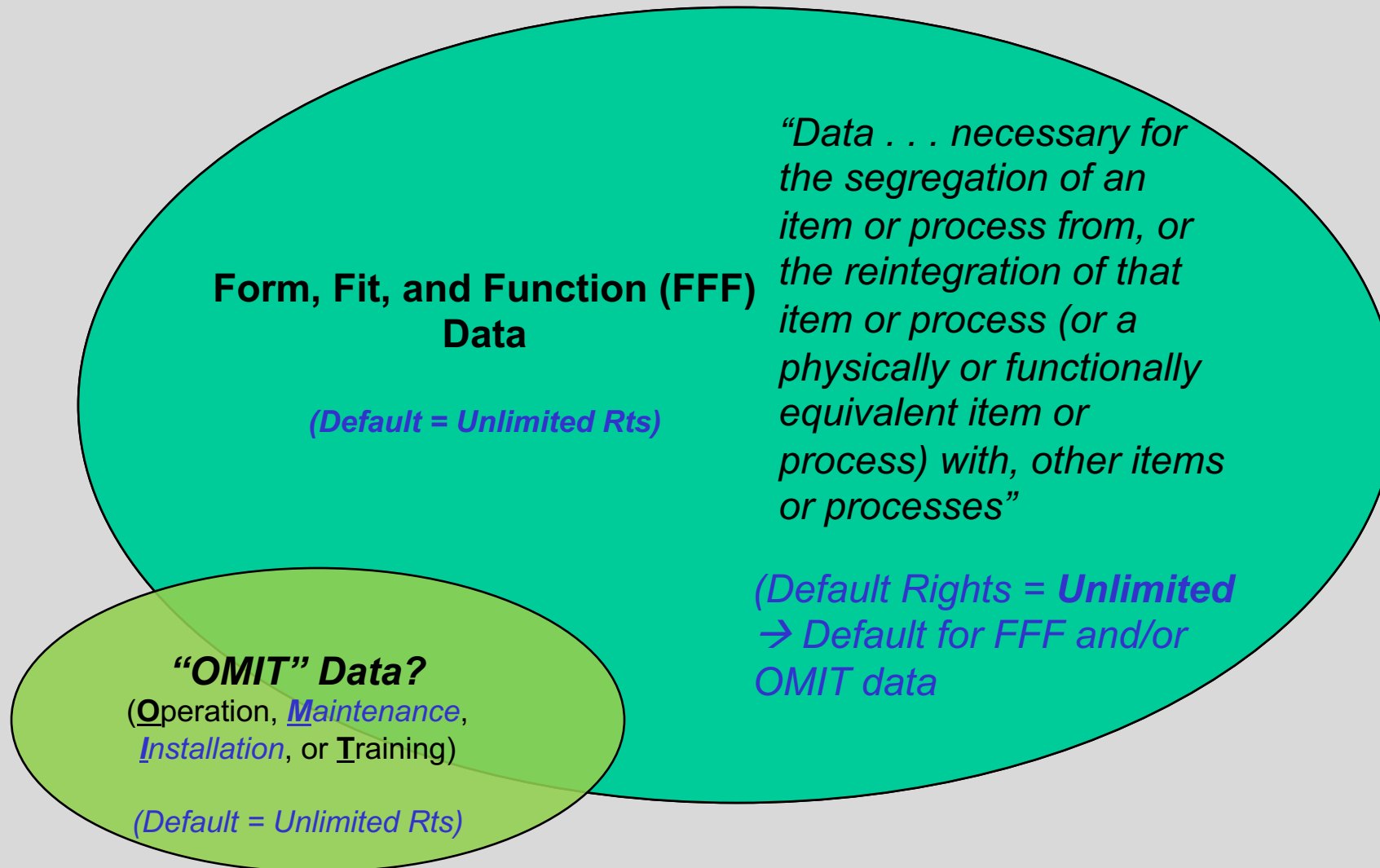
- “... means technical data **that describe** the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.” (DFARS 252.227-7013(a)(6) (FEB 2014))
- Functions as an exception to “OMIT Data” and also to the authorized release of Limited Rights TD to a foreign government for evaluational purposes

Note: Additional details & Bonus Coverage in the Backup Slides

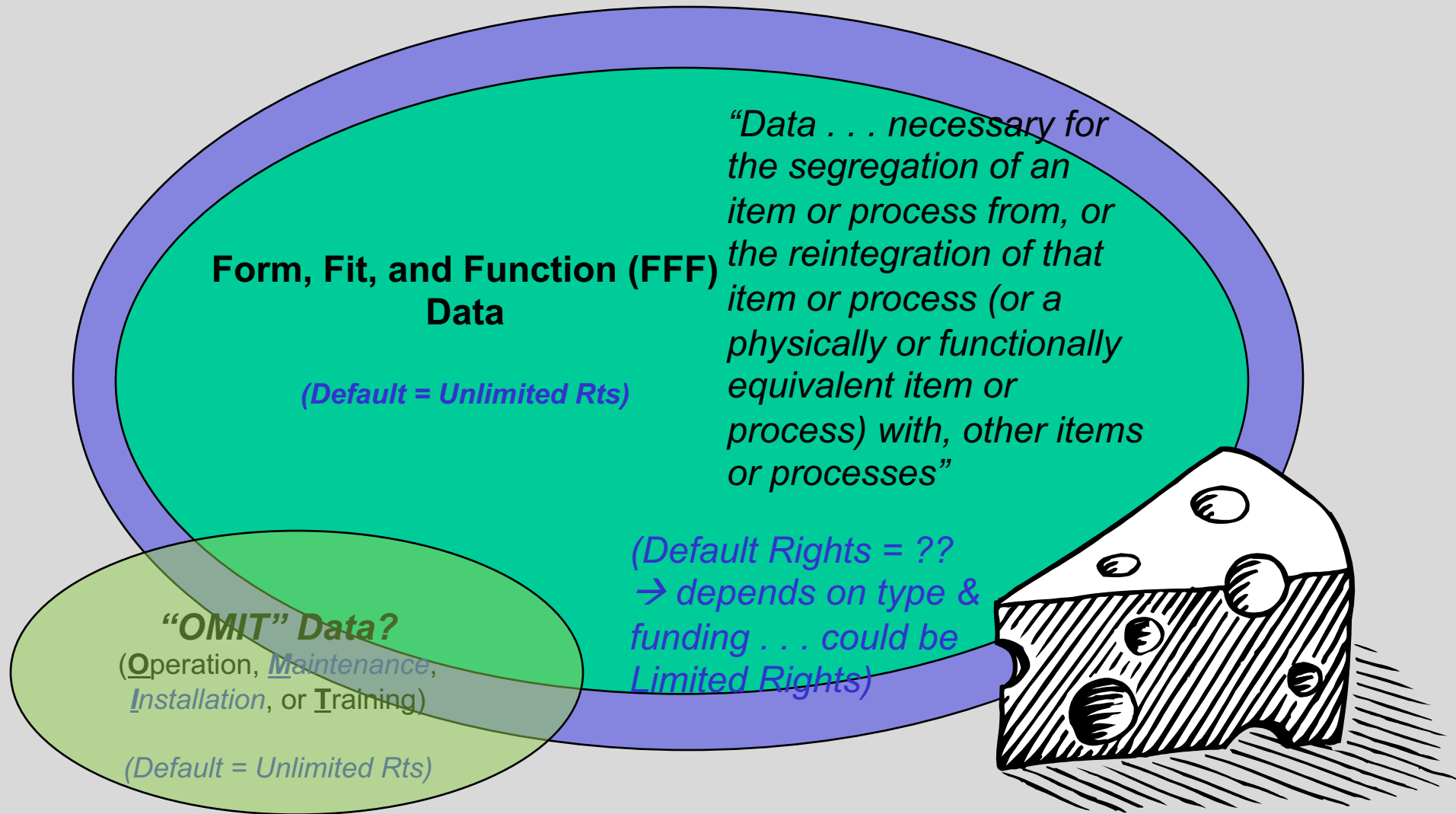
BRAINSTORMING . . .



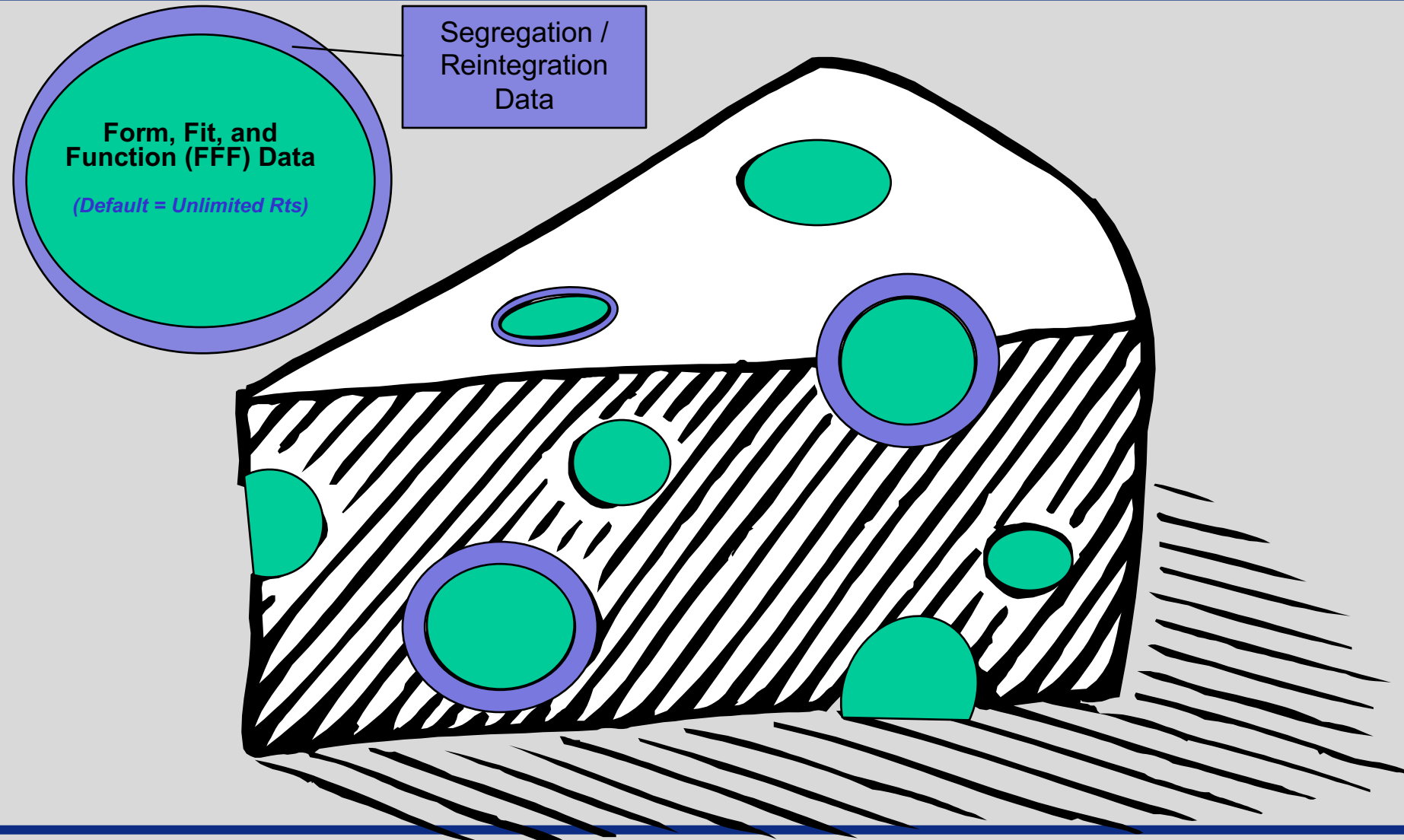
IN SOME CASES. . .



IN OTHER CASES . . .



A SOLUTION FOR THE SWISS CHEESE SYNDROME?



FY12 NDAA – SECTION 815 – DEFERRED ORDERING “PLUS” . . . AND “MINUS”?

■ DEFERRED ORDERING – new par (b)(9) added to 10 U.S.C. § 2320

“(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require *at any time* the delivery of technical data that has been generated *or utilized in the performance of a contract*, and *compensate* the contractor *only* for reasonable costs incurred for having converted and delivered the data in the required form, upon a **determination** that—

“(A) the technical data is *needed* for the purpose of *reprocurement, sustainment, modification, or upgrade* (including through competitive means) of a *major* system or subsystem thereof, a *weapon* system or subsystem thereof, or *any noncommercial* item or process; **AND**

“(B) the technical data—

“(i) pertains to an item or process *developed* in whole or in part with *Federal funds*; **OR**

“(ii) is necessary for the *segregation* of an item or process from, or the *reintegration* of that item or process (or a physically or functionally equivalent item or process) with, ~~other items or processes;~~”

DEFERRED ORDERING – CURRENT DFARS 252.227-7027

- **Use the Clause --** “... when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data.” (227.7103-8(b), 227.7203-8(b))
- **Deferred Ordering of Technical Data Or Computer Software (APR 1988):**
 - “In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of **three (3) years after acceptance of all items** (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software **generated in the performance** of this contract or any subcontract hereunder.
 - “When the technical data or computer software is ordered, the Contractor shall be **compensated for** converting the data or computer software into the prescribed form, for reproduction and delivery.
 - “The obligation to deliver the technical data of a **subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor** under this contract.
 - “The Government's rights to use said data or computer software shall be pursuant to the “Rights in Technical Data and Computer Software” clause of this contract.”

FY17 NDAA – CONF. REPORT

(H. REPT. 114-840)

■ Explanatory Text:

“Modular open system approach in development of major weapon systems (sec. 805)

“The House amendment contained a provision (sec. 1701) that would require all major defense acquisition programs (MDAPs) initiated after January 1, 2019, to be designed and developed with a modular open system approach (MOSA), to the maximum extent practicable.

“The Senate bill contained no similar provision.

“The Senate recedes with an amendment that would clarify when programs are required to start using MOSA. The amendment also would modify the definition of a major system interface to include characterization of the form, function, and content that flows across the interface. The amendment would require the acquisition strategy for a program that uses MOSA to also describe the approach to systems integration and configuration management.”

FY17 NDAA – CONF. REPORT

(H. REPT. 114-840)

■ Explanatory Text:

“Amendments relating to technical data rights (sec. 809)

“The House amendment contained a provision (sec. 1705) that would make several amendments to technical data rights conferred in section 2320 of title 10, United States Code. Among other things, the provision would delineate types of interfaces and specify the rights provided to the U.S. Government in such interfaces. It would require the U.S. Government and Department of Defense contractors to negotiate for data rights when items or processes are developed with a mix of Federal and private funds. The provision also would limit deferred ordering of technical data to 6 years after delivery of the last item on a contract and to technical data generated, not utilized, in the performance of the contract.

“The Senate bill contained no similar provision.

“The Senate recedes with an amendment that would allow the Secretary of Defense to negotiate for rights other than system interfaces if it would be in the best interest of the United States. The amendment would require the Department of Defense to identify major system interfaces in contract solicitations and contracts. For major system interfaces developed exclusively at private expense, the amendment would clarify that the Secretary shall negotiate with the developer appropriate compensation for the technical data. The conferees understand that section 2320 sets forth various rights in technical data, and that the price for acquiring technical data to which the U.S. Government is entitled is determined through negotiations between the Department and contractors. The conferees believe that in the case of privately funded major system interfaces for which the Department asserts government purpose rights it is necessary to explicitly require negotiation for compensation. Notwithstanding this amendment, the conferees expect the standard practice of negotiating prices for technical data to continue for all other categories of rights and circumstances set forth in section 2320.

* * * * * cont'd

FY17 NDAA – CONF. REPORT

(H. REPT. 114-840)

■ Explanatory Text:

Amendments relating to technical data rights (sec. 809) (conclusion)

* * * * *

“The amendment also would specify the U.S. Government’s rights to technical data pertaining to privately funded general interfaces necessary for the segregation and reintegration of an item or process. Finally, the amendment would extend the duration of the government-industry advisory panel established in section 813 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92) and require the advisory panel to consider the technical data rights necessary to support the modular open system approach (MOSA) required elsewhere in this Act. The conferees are aware that the advisory panel has not yet completed its review of sections 2320 and 2321 of title 10, United States Code. The conferees recognize there are many issues in technical data rights that this conference agreement does not address, and are encouraged that the panel’s comprehensive and thoughtful analysis thus far will yield promising recommendations.

“Additionally, the conferees understand that successful implementation of MOSA necessitates the allocation of technical data rights in major system interfaces, a new concept under MOSA. The use of MOSA relies upon the ability of major system components to be added, removed, or replaced as needed throughout the life cycle of the major weapon system due to evolving technology, threats, sustainment, and other factors. Therefore, major system interfaces that share a boundary between major system components and major system platforms are critical, and it is imperative that the government have appropriate access to the technical data of such interfaces. The conferees understand the importance of technical precision in establishing interfaces, and major system components. As such, the conferees urge the Department to carefully consider and take input from the advisory panel and industry on the meanings and implications of these key terms. The conferees expect the Department to include this consideration in its review of the MOSA authorities and its briefing on the implementation of MOSA required in the House report accompanying H.R. 4909 (H. Rept. 114-537) of the National Defense Authorization Act for Fiscal Year 2017.

“The conferees also note that the Department recently issued a proposed rule that would implement amendments to section 2320 of title 10, United States Code, enacted in section 815 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81). Various representatives of industry have expressed concern about the effects on defense acquisition of the amendments made in Public Law 112-81 and the Department’s implementation of such amendments. Therefore, the conferees believe the amendments to technical data rights included in this conference agreement are necessary at this time.

NEW 10 U.S.C. § 2446a

(FROM FY17 NDAA SEC. 805(a))

§ 2446a. Requirement for modular open system approach in major defense acquisition programs; definitions

(a) Modular open system approach requirement. A major defense acquisition program that receives Milestone A or Milestone B approval after January 1, 2019, shall be designed and developed, to the maximum extent practicable, with a modular open system approach to enable incremental development and enhance competition, innovation, and interoperability.

(b) Definitions. In this chapter [10 USCS §§ 2446a et seq.]:

(1) The term "modular open system approach" means, with respect to a major defense acquisition program, an integrated business and technical strategy that--

(A) employs a modular design that uses major system interfaces between a major system platform and a major system component, between major system components, or between major system platforms;

(B) is subjected to verification to ensure major system interfaces comply with, if available and suitable, widely supported and consensus-based standards;

(C) uses a system architecture that allows severable major system components at the appropriate level to be incrementally added, removed, or replaced throughout the life cycle of a major system platform to afford opportunities for enhanced competition and innovation while yielding--

(i) significant cost savings or avoidance;

(ii) schedule reduction;

(iii) opportunities for technical upgrades;

(iv) increased interoperability, including system of systems interoperability and mission integration; or

(v) other benefits during the sustainment phase of a major weapon system; and

(D) complies with the technical data rights set forth in section 2320 of this title [10 USCS § 2320].

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NEW 10 U.S.C. § 2446a

(FROM FY17 NDAA SEC. 805(a))

[(b) Definitions. In this chapter [10 USCS §§ 2446a et seq.] [conclusion]:]

(2) The term "major system platform" means the highest level structure of a major weapon system that is not physically mounted or installed onto a higher level structure and on which a major system component can be physically mounted or installed.

(3) The term "major system component"--

(A) means a high level subsystem or assembly, including hardware, software, or an integrated assembly of both, that can be mounted or installed on a major system platform through well-defined major system interfaces; and

(B) includes a subsystem or assembly that is likely to have additional capability requirements, is likely to change because of evolving technology or threat, is needed for interoperability, facilitates incremental deployment of capabilities, or is expected to be replaced by another major system component.

(4) The term "major system interface"--

(A) means a shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements; and

(B) is characterized clearly in terms of form, function, and the content that flows across the interface in order to enable technological innovation, incremental improvements, integration, and interoperability.

(5) The term "program capability document" means, with respect to a major defense acquisition program, a document that specifies capability requirements for the program, such as a capability development document or a capability production document.

(6) The terms "program cost targets" and "fielding target" have the meanings provided in section 2448a(a) of this title [10 USCS § 2448a(a)].

(7) The term "major defense acquisition program" has the meaning provided in section 2430 of this title [10 USCS § 2430].

(8) The term "major weapon system" has the meaning provided in section 2379(f) of this title [10 USCS § 2379(f)].

NEW 10 U.S.C. § 2446b

(FROM FY17 NDAA SEC. 805(a))

§ 2446b. Requirement to address modular open system approach in program capabilities development and acquisition weapon system design

(a) Program capability document. A program capability document for a major defense acquisition program shall identify and characterize--

- (1) the extent to which requirements for system performance are likely to evolve during the life cycle of the system because of evolving technology, threat, or interoperability needs; and
- (2) for requirements that are expected to evolve, the minimum acceptable capability that is necessary for initial operating capability of the major defense acquisition program.

(b) Analysis of alternatives. The Director of Cost Assessment and Performance Evaluation, in formulating study guidance for analyses of alternatives for major defense acquisition programs and performing such analyses under section 139a(d)(4) of this title [10 USCS § 139a(d)(4)], shall ensure that any such analysis for a major defense acquisition program includes consideration of evolutionary acquisition, prototyping, and a modular open system approach.

(c) Acquisition strategy. In the case of a major defense acquisition program that uses a modular open system approach, the acquisition strategy required under section 2431a of this title [10 USCS § 2431a] shall--

- (1) clearly describe the modular open system approach to be used for the program;
- (2) differentiate between the major system platform and major system components being developed under the program, as well as major system components developed outside the program that will be integrated into the major defense acquisition program;
- (3) clearly describe the evolution of major system components that are anticipated to be added, removed, or replaced in subsequent increments;
- (4) identify additional major system components that may be added later in the life cycle of the major system platform;
- (5) clearly describe how intellectual property and related issues, such as technical data deliverables, that are necessary to support a modular open system approach, will be addressed; and
- (6) clearly describe the approach to systems integration and systems-level configuration management to ensure mission and information assurance.

(d) Request for proposals. The milestone decision authority for a major defense acquisition program that uses a modular open system approach shall ensure that a request for proposals for the development or production phases of the program shall describe the modular open system approach and the minimum set of major system components that must be included in the design of the major defense acquisition program.

(e) Milestone B. A major defense acquisition program may not receive Milestone B approval under section 2366b of this title [10 USCS § 2366b] until the milestone decision authority determines in writing that--

- (1) in the case of a program that uses a modular open system approach--
 - (A) the program incorporates clearly defined major system interfaces between the major system platform and major system components, between major system components, and between major system platforms;
 - (B) such major system interfaces are consistent with the widely supported and consensus-based standards that exist at the time of the milestone decision, unless such standards are unavailable or unsuitable for particular major system interfaces; and
 - (C) the Government has arranged to obtain appropriate and necessary intellectual property rights with respect to such major system interfaces upon completion of the development of the major system platform; or
- (2) in the case of a program that does not use a modular open system approach, that the use of a modular open system approach is not practicable.

NEW 10 U.S.C. § 2446c

(FROM FY17 NDAA SEC. 805(a))

§ 2446c. Requirements relating to availability of major system interfaces and support for modular open system approach

The Secretary of each military department shall--

(1) coordinate with the other military departments, the defense agencies, defense and other private sector entities, national standards-setting organizations, and, when appropriate, with elements of the intelligence community with respect to the specification, identification, development, and maintenance of major system interfaces and standards for use in major system platforms, where practicable;

(2) ensure that major system interfaces incorporate commercial standards and other widely supported consensus-based standards that are validated, published, and maintained by recognized standards organizations to the maximum extent practicable;

(3) ensure that sufficient systems engineering and development expertise and resources are available to support the use of a modular open system approach in requirements development and acquisition program planning;

(4) ensure that necessary planning, programming, and budgeting resources are provided to specify, identify, develop, and sustain the modular open system approach, associated major system interfaces, systems integration, and any additional program activities necessary to sustain innovation and interoperability; and

(5) ensure that adequate training in the use of a modular open system approach is provided to members of the requirements and acquisition workforce.

TENSION POINT: COMMERCIAL SUBCONTRACTORS & SUPPLIERS

- **DFARS 227.7103-15, and .7203-15: “Subcontractor rights in [TD and CS],” respectively**
 - 2320 & 2321 provides same protections to subcontractors (subKors) at all tiers – both refer to “contractor or subcontractor” throughout
 - 2321 expressly permits subKor to transact directly w/USG re validation

- **Commercial Subcontractors**
 - 2320 and 2321 expressly refer to commercial items
 - Note: 2321(f) addresses presumptions expressly in the context of Kors/subKors for commercial items

- **“Subcontractor” vs. “Supplier”?**
 - **227.7101(a) and .7201(a):** “As used in this subpart, unless otherwise specifically indicated, the terms “offeror” and “contractor” include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.”